Supreme Court, U.S.
FILED

08-672 NOV 18 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

112

NO. __-____

IN THE
Supreme Court of the United States

EQUITY IN ATHLETICS, INC.,
PETITIONER,

v.

DEPARTMENT OF EDUCATION, *ET AL.*,
RESPONDENTS.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF *CERTIORARI*

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
Fax: (202) 318-2254

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869
Fax: (505) 848-1882

* Counsel of Record

QUESTIONS PRESENTED

Whether the implied private right of action under Title IX of the Education Amendments of 1972 ("Title IX") preempts or otherwise displaces the rights of action under 42 U.S.C. §1983 and *Ex parte Young*?

Whether Title IX, §844 of the Education Amendments of 1974, and the Department of Education Organization Act delegated interpretive authority to the Department of Health, Education & Welfare and transferred that authority to respondent Department of Education?

Whether the Fourth Circuit's *Blackwelder* and *Quince Orchard* tests apply the proper standard for entitlement to preliminary injunctive relief?

Whether petitioner Equity in Athletics, Inc., has demonstrated entitlement to preliminary injunctive relief?

PARTIES TO THE PROCEEDING

Petitioner is Equity in Athletics, Inc. ("EIA"), a nonprofit membership organization. EIA's members include, without limitation, coaches, student-athletes, fans, booster clubs, parents, save-our-sport groups, and/or alumni affiliated with various secondary and post-secondary athletic programs. Of particular relevance here, EIA's members include male and female athletes on the ten intercollegiate athletic teams eliminated by the James Madison University on July 1, 2007, and on the demoted "club" teams that replaced the eliminated intercollegiate teams. In addition, EIA's members include female athletes on the retained intercollegiate women's track, cross country, and swimming teams who lost the benefit of associating, training, and participating with their eliminated male counterparts.

Respondents are the U.S. Department of Education ("DOE"), its Secretary and Assistant Secretary for Civil Rights in their official capacities and their individual capacities under color of legal authority, the United States, James Madison University ("JMU"), The Visitors of James Madison University (a Virginia corporate entity), the JMU Rector, Vice Rector, Visitors, President, and Athletic Director in their official capacities and their individual capacities under color of legal authority, and John Does and John Doe entities.

Officer substitutions aside, respondents were the defendants in district court and appellees in the court of appeals.* DOE's Secretary and Assistant Secretary currently are Margaret Spellings and Stephanie Monroe, respectively, which presumably will change with the incoming federal administration. The JMU Visitors currently are Meredith Strohm Gunter (Rector), James E. Hartman (Vice Rector), Mark T. Bowles, Joseph F. Damico, Ronald C. Devine, Vanessa M. Evans, Lois J. Forbes, Charles H. Foster Jr, Joseph K. Funkhouser, II, Stephen R. Leeolou, Elizabeth V. Lodal, Wharton B. Rivers Jr., Larry M. Rogers, Judith S. Strickler, and Fred D. Thompson, Jr. The JMU President and Athletic Director currently are Linwood H. Rose and Jeffrey T. Bourne, respectively.

Pursuant to this Court's Rule 29.6, petitioner states that EIA is a non-profit corporation, and no publicly held company owns any interest in EIA.

---

* To the extent that officers have changed during the course of this litigation, the successors have substituted for the initial officeholders. FED. R. CIV. P. 25(d)(1); FED. R. APP. P. 43(c)(2); Supreme Court Rule 35.3.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding ii
Table of Contents iv
Appendix vi
Table of Authorities vii
Petition for Writ of *Certiorari* 1
Opinions Below 1
Jurisdiction 1
Authorities Involved 1
Statement of the Case 2
Factual Background 3
Statutory Background 5
Regulatory Background 9
Reasons to Grant the Writ 12
I. Title IX Did Not Preempt §1983 or *Ex Parte Young* 12
A. Title IX Did Not Preempt §1983 14
B. Title IX Did Not Preempt *Ex parte Young* . 17
II. No Statute Delegates or Transfers Interpretive Authority to HEW or DOE 18
A. Title IX Did Not Delegate Authority 18
B. §844 Did Not Delegate Authority 19
C. DEOA Did Not Transfer Authority 21
III. *Blackwelder* and *Quince Orchard* Misstate the Test for Interim Relief 23
IV. EIA Is Entitled to Interim Relief 24
A. EIA Is Likely to Succeed on Merits 25
1. Rule Change Required Rulemaking 25

2. Non-Rule Guidance Is an Order 29
3. Courts Failed to Consider GEPA 31
4. Quota-Driven Cuts Violate Title IX 32
5. Fourteenth Amendment Requires Interest-Based Analysis 33
B. EIA's Members Face Irreparable Harm 34
C. Harm to JMU Is Merely Financial 35
D. Public Interest Favors Interim Relief 36
Conclusion 39

APPENDIX

Equity in Athletics, Inc. v. Dep't of Educ.,
No. 07-1914 (4th Cir. 2008) (decision) 1a
Equity in Athletics, Inc. v. Dep't of Educ.,
No. 07-1914 (4th Cir. 2008) (judgment) 15a
Equity in Athletics, Inc. v. Dep't of Educ.,
504 F.Supp.2d 88 (W.D. Va. 2007) (decision).... 16a
Equity in Athletics, Inc. v. Dep't of Educ.,
No. 5:07-0028-GEC (W.D. Va. 2007) (order) 74a
U.S. CONST. amend. V 75a
U.S. CONST. amend. XIV, §1 ..... 75a
5 U.S.C. §551(4)-(6) 75a
5 U.S.C. §553(b)-(d) 76a
20 U.S.C. §1231 (1979) 78a
20 U.S.C. §1681(a)-(b) 79a
20 U.S.C. §1682 ..... 80a
20 U.S.C. §1683 ..... 80a
42 U.S.C. §1983 ..... 81a
42 U.S.C. §1988(a) 81a
Pub. L. No. 93-380, §844, 88 Stat. 612 (1974) 82a
VA. CODE ANN. §2.2-3901 ..... 83a
45 C.F.R. §86.41(a)-(c)(1) 83a
Title IX of the Education Amendments of 1972;
a Policy Interpretation; Title IX & Intercollegiate
Athletics, 44 Fed. Reg. 71,413 (1979) 84a
Clarification of Intercollegiate Athletics Policy
Guidance: Three-Part Test (Jan. 16, 1996) 99a
Further Clarification of Intercollegiate Athletics
Policy Guidance Regarding Title IX Compliance
(Jul. 11, 2003) 129a
Additional Clarification of Intercollegiate Athletics
Policy: Three-Part Test – Part Three
(Mar. 17, 2005) 135a

TABLE OF AUTHORITIES

Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772 (5th Cir. 1999) 24

Alexander v. Sandoval, 532 U.S. 275 (2001) 5

American Mining Congress v. M.S.H.A., 995 F.2d 1106 (D.C. Cir. 1993) 27

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 23

Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832 (Fed. Cir. 1992) 24

Bd. of Pub. Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) 31

Bird v. Centennial Ins. Co., 11 F.3d 228 (1st Cir. 1993) 24

Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977) 23-24, 37

Bowen v. Am. Hospital Ass'n, 476 U.S. 610 (1986) . 19

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 19

Bragdon v. Abbott, 524 U.S. 624 (1998) 19

Brogan v. U.S., 522 U.S. 398 (1998) 38

Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749 (2nd Cir. 1998) 13

Cannon v. Univ. of Chicago, 441 U.S. 694 (1979) 15-16

Chevron, U.S.A., Inc. v. N.R.D.C., 467 U.S. 837 (1984) 19-20

Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985) 27

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 14-15
Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) 33, 38
Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) 38
Connecticut v. Teal, 457 U.S. 440 (1982) 22
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 3
Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997) ... 13
Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152 (D.C. Cir. 2005) 14
D.O.L. v. Wolf Run Mining Co., 452 F.3d 275 (4th Cir. 2006) 35
Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 32
E.E.O.C. v. Commercial Office Products Co., 486 U.S. 107 (1988) 30
Equity in Athletics, Inc. v. Dep't of Educ., 504 F.Supp.2d 88 (W.D. Va. 2007) .....*passim*
Equity in Athletics, Inc. v. Dep't of Educ., No. 07-1914 (4th Cir. 2008) .....*passim*
Ex parte Young, 209 U.S. 123 (1908) 12, 13, 17
F.C.I.C. v. Merrill, 332 U.S. 380 (1947) 17-18
Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 14
Fitzgerald v. Barnstable School Comm., 504 F.3d 165 (1st Cir. 2007) 13
Fitzgerald v. Barnstable School Committee, No. 07-1125 (U.S.) 13

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 16
Frank's GMC Truck Ctr. v. General Motors Corp., 847 F.2d 100 (3rd Cir. 1988) 36
FTC v. Standard Oil Co., 449 U.S. 232 (1980).. 11, 31
Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813 (7th Cir. 1999) 24
In re Microsoft Corp., 333 F.3d 517 (4th Cir. 2003) . 23
Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys., 195 F.3d 28 (D.C. Cir. 1999) 13
Independent U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) 28
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) .. 19, 30
Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994)..... 33
Jennings v. Univ. of N. Carolina, 482 F.3d 686 (4th Cir. 2007) (*en banc*) 13
Kelley v. Bd. of Trs., 35 F.3d 265 (7th Cir. 1994) 12
Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996) 13
Loving v. U.S., 517 U.S. 748 (1996)..... 27
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) . 16
Lujan v. Franklin County Bd. of Educ., 766 F.2d 917 (6th Cir. 1985) 30
Lyng v. Int'l Union, 485 U.S. 360 (1988)..... 34
Maryland Undercoating Co. v. Paine, 603 F.2d 477 (4th Cir. 1979) 37
Matter of Appletree Markets, 19 F.3d 969 (5th Cir. 1994) 20
Maynard v. Cartwright, 486 U.S. 356 (1988)..... 18

Mayor v. Educational Equality League, 415 U.S. 605 (1974) 33-34
McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988) 28
McMellon v. U.S., 387 F.3d 329 (4th Cir. 2004) 13
Modaber v. Culpeper Memorial Hospital, 674 F.2d 1023 (4th Cir. 1982) 13
Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 30
Nat'l Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604 (D.C. Cir. 1980) 35, 37
Nat'l Tour Brokers Ass'n v. U.S., 591 F.2d 896 (D.C. Cir. 1978) 28
Nat'l Wrestling Coaches Ass'n v. DOE, 366 F.3d 930 (D.C. Cir. 2004) 28
Neal v. Bd. of Tr., 198 F.3d 763 (9th Cir. 1999) 38
North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) 7, 22
Orff v. U.S., 358 F.3d 1137 (9th Cir. 2004) 14
Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007) 12, 33
Pers. Adm'r v. Feeney, 442 U.S. 256 (1979) 5
Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3rd Cir. 1990) 13
Public Citizen v. Shalala, 932 F.Supp. 13 (D.D.C. 1996) 20
Quince Orchard Valley Citizens Assoc. v. Hodel, 872 F.2d 75 (4th Cir. 1989) 23-24
Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969) 30-31

Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977) 27
Rogers v. Stratton Indus., 798 F.2d 913 (6th Cir. 1986) 14
Safety-Kleen, Inc. v. Wyche, 274 F.3d 846 (4th Cir. 2001) 23
Sch. Dist. v. H.E.W., 431 F.Supp. 147 (E.D. Mich. 1977) 31
Schlesinger v. Councilman, 420 U.S. 738 (1975) 17
Scotts Co. v. United Indus. Corp., 315 F.3d 264 (4th Cir. 2002) 36
Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996)..... 13
Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) 15-16
Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)..... 38
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 19
Smith v. Robinson, 468 U.S. 992 (1984)..... 15-16
South Dakota v. Dole, 483 U.S. 203 (1987) 17
Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979) 32
Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 14
Texaco Inc. v. Louisiana Land & Exploration Co., 995 F.2d 43 (5th Cir. 1993) 13
Texaco, Inc. v. F.P.C., 412 F.2d 740 (3rd Cir. 1969) 26
U.S. v. Am. Library Ass'n, 539 U.S. 194 (2003) 17
U.S. v. Eaton, 169 U.S. 331 (1898) 20

U.S. v. Jefferson County Bd. of Ed., 380 F.2d 385 (5th Cir. 1967) (*en banc*) 31
U.S. v. Mead Corp., 533 U.S. 218 (2001) 19
U.S. v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989) 26
U.S. v. Troup, 821 F.2d 194 (3rd Cir. 1987) 14
United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) 5-6
Utah Wilderness Alliance v. Dabney, 222 F.3d 819 (10th Cir. 2000) 20
Valdez v. Applegate, 616 F.2d 570 (10th Cir. 1980) . 37
Wachtel v. O.T.S., 982 F.2d 581 (D.C. Cir. 1993).... 19
Waid v. Merrill Area Pub. Sch., 91 F.3d 857 (7th Cir. 1996) 13
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 6
Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994)... 37
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 6
Williams v. Sch. Dist., 998 F.2d 168 (3rd Cir. 1993) 13, 38
Winter v. NRDC, __ U.S. __ (2008) 3, 23
Yakus v. U.S., 321 U.S. 414 (1944) 37

Statutes

U.S. CONST. art. I, §1 27
U.S. CONST. amend. V 2
U.S. CONST. amend. XIV, §1 ... 2, 11, 17, 25, 33-34, 37
Administrative Procedure Act
5 U.S.C. §§551-706 ..... 2, 26, 28
5 U.S.C. §551 1

5 U.S.C. §551(4) 26, 31
5 U.S.C. §551(5) 26
5 U.S.C. §551(6) 31
5 U.S.C. §553 ..... 1, 2
5 U.S.C. §553(b) 26
5 U.S.C. §706 27
General Education Provisions Act, 20 U.S.C. §1231 (1979) 2, 11, 24, 28, 31-32
20 U.S.C. §1232(a)(1) (1979) 32
20 U.S.C. §1232(d)(1) (1979) 32
Title IX of the Education Amendments of 1972, §§1681-1688 ..... *passim*
20 U.S.C. §1681 1
20 U.S.C. §1681(a) 1-2, 5, 7, 15
20 U.S.C. §1681(b) 5, 6
20 U.S.C. §1682 ..... 1, 6, 15, 22, 26, 29, 31
20 U.S.C. §1683 1
20 U.S.C. §3413 22
20 U.S.C. §3441(a)(1) 9, 21
20 U.S.C. §3441(a)(2) 9, 21
20 U.S.C. §3441(a)(3) 9, 21, 22
20 U.S.C. §3441(a)(4) 9
20 U.S.C. §3441(a)(5) 9
20 U.S.C. §3441(a)(6) 9
20 U.S.C. §3441(b) 9
20 U.S.C. §3505(a) 2
20 U.S.C. §3508(b) 9, 22
28 U.S.C. §1254(1) 1

28 U.S.C. §1292(a)(1) 1
28 U.S.C. §1331 ..... 1, 17
28 U.S.C. §1343(a)(3) 1
28 U.S.C. §1343(a)(4) 1
42 U.S.C. §1983 ..... 1, 12-17, 18, 34,
42 U.S.C. §1988(a) 1, 34
Title VI of the Civil Rights Act of 1964, §§2000d-2000d-7 ..... 5, 6-7, 15, 16, 17, 29, 31, 33
42 U.S.C. §2000d 16
42 U.S.C. §2000d-1 ..... 6-7, 16, 29, 30, 31
Title VII of the Civil Rights Act of 1964, §§2000e-2000e-17 ..... 5, 32
Pub. L. No. 93-380, §801, 88 Stat. 484, 597 (1974) ... 8
Pub. L. No. 93-380, §844, 88 Stat. 484, 612 (1974) 7-8, 19-21, 22, 23
Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) ("DEOA") 8-9, 21-22
VA. CODE ANN. §2.2-3901 ..... 1, 2, 34
VA. CODE ANN. §2.2-3700(B) 5

Legislative History

H.R. 7152, 88th Cong. §601 (1963) 16
H.R. 7152, 88th Cong. §602 (1963) 29-30
110 Cong. Rec. 2499-00 (1964) 7
110 Cong. Rec. 5256 (1964) 7
110 Cong. Rec. 6544 (1964) 7
110 Cong. Rec. 6562 (1964) 7
110 Cong. Rec. 6749 (1964) 7
110 Cong. Rec. 6988 (1964) 7

110 Cong. Rec. 7058 (1964) 7
110 Cong. Rec. 7059 (1964) 7
110 Cong. Rec. 7066 (1964) 7
110 Cong. Rec. 7067 (1964) 7
110 Cong. Rec. 7103 (1964) 7
110 Cong. Rec. 11,930 (1964) 30
110 Cong. Rec. 11,941 (1964) 7
110 Cong. Rec. 12,716 (1964) 7
110 Cong. Rec. 13,334 (1964) 7
110 Cong. Rec. 13,377 (1964) 7
117 Cong. Rec. 30,404 (1971) 18
117 Cong. Rec. 30,407 (1971) 18
117 Cong. Rec. 39,251 (1971) 5
117 Cong. Rec. 39,259 (1971) 5
117 Cong. Rec. 39,262 (1971) 5
118 Cong. Rec. 5803 (1972) 6, 18
118 Cong. Rec. 5807 (1972) 6
118 Cong. Rec. 5808 (1972) 6
118 Cong. Rec. 5812-13 (1972). 5
120 Cong. Rec. 15,322-23 (1974) 7
H.R. 69, §536 (Tower), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) 8
Conf. Rep. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4271 ..... 8, 20
H.R. Conf Rep. 96-459, 46-47, reprinted in 1979 U.S.C.C.A.N. 1612, 1626 22

Rules, Regulations and Orders

34 C.F.R. pt. 106 22

45 C.F.R. pt. 86 22
45 C.F.R. §86.41 1
45 C.F.R. §86.41(a) 2, 26
45 C.F.R. §86.41(c) 26
45 C.F.R. §86.41(c)(1) 2, 10, 26, 27
Effectuation of Title VI of the Civil Rights Act of 1964: Nondiscrimination in Federally-Assisted Programs of—Dep't of the Interior, Dep't of Agriculture, Dep't of Labor, Dep't of Health, Education, and Welfare, General Services Administration, Housing and Home Finance Agency, National Science Foundation, 29 Fed. Reg. 16,274 (1964) 29
Nondiscrimination in Federally Assisted Programs of Dep't of Health, Education, and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964, 32 Fed. Reg. 14,555 (1967) 29
Nondiscrimination on the basis of sex in education programs and activities receiving or benefiting from federal financial assistance, 40 Fed. Reg. 24,128 (1975) 10, 29
Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX & Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979) 2, 10-11
Executive Order 12,250, 45 Fed. Reg. 72,995 (1980) 2
Clarification of Intercollegiate Athletics Policy Guidance: Three-Part Test (Jan. 16, 1996) 2, 11

Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (Jul. 11, 2003) 2, 11

Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three (Mar. 17, 2005) 2, 11

Other Authorities

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong. (1975) 6-7, 10

11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4 36

PETITION FOR WRIT OF *CERTIORARI*

Equity in Athletics, Inc. ("EIA") respectfully petitions this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Fourth Circuit, which affirmed the district court's denial of interim injunctive relief.

OPINIONS BELOW

The Fourth Circuit's unreported decision and judgment are reprinted in the Appendix ("App.") at 1a and 15a, respectively. The district court's decision is reported at 504 F.Supp.2d 88 and reprinted with the accompanying order at 16a and 74a, respectively.

JURISDICTION

The court of appeals issued its decision on August 20, 2008. The district court had jurisdiction under 28 U.S.C. §1331 and §1343(a)(3)-(4), and the Fourth Circuit had jurisdiction under 28 U.S.C. §1292(a)(1). This Court has jurisdiction under 28 U.S.C. §1254(1).

AUTHORITIES INVOLVED

The Appendix quotes relevant excerpts from 20 U.S.C. §§1681-1683; 42 U.S.C. §§1983, 1988(a), 5 U.S.C. 551, 553; 45 C.F.R. §86.41; VA. CODE ANN. §2.2-3901; and federal agency orders from 1979, 1996, 2003, and 2005. The authorities fall into three substantive and procedural areas:

1. ***Prohibition of Discrimination.*** Title IX's protection that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program... receiving Federal financial assistance." 20

U.S.C. §1681(a); 45 C.F.R. §86.41(a) (same for athletics programs); U.S. CONST. amend. V, XIV, §1 (same for federal and state actions).

2. ***Equal-Opportunity Mandate.*** The Title IX regulations require schools to provide equal athletic opportunity, based on the assessed interests and abilities of both genders, 45 C.F.R. §86.41(c)(1), which Virginia has adopted as its state law. VA. CODE ANN. §2.2-3901. Various federal agency orders collectively purport to amend the regulatory standard to equal participation, based on enrollment. App. 84a-138a.

3. ***Required Procedures.*** The relevant procedural protections include notice-and-comment rulemaking requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §553, the then-applicable laying-before requirements of the General Education Provisions Act, 20 U.S.C. §1231 (1979) ("GEPA"), as well as the civil rights laws' requirement for presidential approval before rules, regulations, and orders of general applicability take effect, 20 U.S.C. §1682.[1]

STATEMENT OF THE CASE

EIA seeks reinstatement of ten athletic teams cut by James Madison University ("JMU") expressly

---

[1] Executive Order 12,250 delegates the presidential-approval authority to the Attorney General. 45 Fed. Reg. 72,995 (1980). Because no President or Attorney General has approved DOE's Title IX regulations, the Department of Health, Education & Welfare ("HEW") regulations remain in effect for DOE. 20 U.S.C. §3505(a).

to meet the "proportionality test of Title IX." CAJA 200.[2] In place of "proportionality," EIA argues that the original Title IX regulatory standard (equal opportunity, based on athletic interest) remains in effect and forbids JMU's cuts. Supported by the federal parties responsible for the confusion, JMU argues its rival standard (equal participation, based on enrollment), which is substantively foreign to both civil-rights law and Title IX.

The case hinges, then, on competing concepts of "equality" and on the procedural requirements for moving from one to the other. Although this Court reviews denials of interim injunctive relief for abuse of discretion, a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *cf. Winter v. NRDC*, __ U.S. __, __ (2008) (slip op., at 21) (Court may reach merits on appeal of interim relief). Here, EIA asks the Court to review the denial of interim relief after reviewing the underlying legal errors.

Factual Background

On September 29, 2006, JMU announced its decision to cut ten athletic teams (men's and women's gymnastics and archery, men's cross country, indoor and outdoor track and field, swimming, and wrestling, and women's fencing), effective July 1, 2007, to equalize its athletic-participation and enrollment ratios, by gender. CAJA

---

[2] EIA cites the Court of Appeals Joint Appendix as "CAJA."

200. The announcement stunned the students, who then organized to seek reconsideration of the decision. *Id.* 147, 149, 153, 156, 159, 162, 166, 169, 172, 176, 179, 182, 333, "[B]ecause JMU dragged [its] feet so long during the school year," the students could not present their reinstatement request to JMU's Board of Visitors until January 12, 2007, which they rejected with "a blanket response that was... written out beforehand." *Id.* 333.

Men have equivalent or greater interest in the reciprocal sports (cross-country, track, and swimming) that JMU retained for women, and men have equivalent or greater interest in wrestling than women have in women's non-reciprocal sports that JMU retained. *Id.* at 69, 74-90. Archery, gymnastics, and fencing suffered from JMU's preemptive action to avert proportionality-backed challenges from women's clubs (*e.g.*, water polo, equestrian), *id.* at 93, notwithstanding men's and women's equivalent interest in those sports. *Compare id.* at 83 *with id.* at 90. The interest-based standard prohibited the former cuts and did not require the latter.

EIA incorporated on February 5, 2007, began publicly accepting members on March 14, 2007, and filed this lawsuit against only the federal defendants on March 19, 2007. *Id.* 1. By letter dated March 23, 2007, EIA forwarded JMU the initial complaint under a cover letter explaining EIA's legal position and notifying JMU that EIA would name it as a defendant unless JMU deferred its planned cuts, which JMU rejected on April 4, 2007. *Id.* 107. EIA added the JMU defendants on June 1, 2007, and moved for interim injunctive relief on June 15, 2007.

Notwithstanding its state-law obligations to operate transparently, VA. CODE ANN. §2.2-3700(B), JMU conducted its planning in secret and affirmatively misled student-athletes who came to JMU. CAJA 203-04, 334. The students on the ten demoted club teams are ready, willing, and able to compete on reinstated intercollegiate teams. *Id.* 147-48, 159, 163, 166, 169-70, 173, 177, 180, 185. Although student fees provide the athletic budget's "major component," JMU's athletic conference would rebate more than $200,000 annually (approximately $22,000 per team) to field the teams. *Id.* 366, 209.

The district court held an evidentiary hearing on July 19, 2007, and denied EIA's motion on August 21, 2007. The Fourth Circuit heard oral argument on March 18, 2008, and affirmed on August 20, 2008.

Statutory Background

Title IX. Modeled on Title VI of the Civil Rights Act of 1964, Title IX prohibits gender-based discrimination in federally funded education programs. 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits intentional discrimination (*i.e.,* actions *because* of gender, not merely *in spite of* gender), *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001), *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979), and seeks to eliminate all "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." 117 Cong. Rec. 30,409, 39,251 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972).

In a key departure from Title VI, Congress included Title VII's restriction against preferential treatment based on imbalances with the population, 20 U.S.C. 1681(b), which is "designed to prevent...

undue 'Federal Government interference... because of some Federal employee's ideas of... balance.'" *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206-07 (1979). Although §901(b) allows agencies to consider "statistical evidence" in a specific "hearing or proceeding," 20 U.S.C. 1681(b), it "would be contrary to Congress' clearly expressed intent" to allow "quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989).

Like Title VI, Title IX authorizes agencies to "effectuate" the statutory prohibition against intentional discrimination, 20 U.S.C. 1682, authority the Senate sponsor said "to permit differential treatment by sex" only in "*very unusual* cases" where "such treatment is *absolutely necessary*," such as the need for privacy in locker rooms. 118 Cong. Rec. 5807 (1972) (emphasis added). Otherwise, §902 is identical to §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1, which provides the only relevant history.[3]

---

[3] *See* 118 Cong. Rec. 5803 (Title IX would have the same procedural protections afforded under Title VI) (Sen. Bayh); *id.* at 5808 ("These provisions [including what became Section 902] parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., at 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same

(Footnote cont'd on next page)

That history makes clear that agencies must act via rules, regulations, and orders of general applicability, 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the President in the *Federal Register*. *Id.;* 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay); *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 522 n.12 (1982).[4]

"Javits Amendment." In 1974, Senator Tower introduced an amendment to exempt revenue-producing intercollegiate athletics from §901(a) and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 Cong. Rec. 15,322-23 (1974). Although his review of the legislative history indicated Title IX's inapplicability to athletics, he offered his amendment to clarify that – *if a court found Title IX to apply to athletics* – it nonetheless would exempt

---

(Footnote cont'd from previous page.)

coverage as had been provided under Title VI") (prepared statement of Sen. Bayh) (hereinafter "*1975 Hearing*").

[4] Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreaching. *See* 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 7059 (Sen. Pastore); 110 Cong. Rec. 5256 (Sen. Humphrey); 110 Cong. Rec. 6544 (Sen. Humphrey); 110 Cong. Rec. 6749 (Sen. Moss); 110 Cong. Rec. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 Cong. Rec. 7058 (Sen. Pastore); 110 Cong. Rec. 7066 (Sen. Kuchel); 110 Cong. Rec. 7067 (Sen. Kuchel); 110 Cong. Rec. 7103 (Sen. Javits); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy, inserted by Sen. Cooper); 110 Cong. Rec. 12,716 (Sen. Humphrey); 110 Cong. Rec. 13,334 (Sen. Pastore); 110 Cong. Rec. 13,377 (Sen. Allott).

revenue-producing sports. *Id.* 15,323. The requirement to publish proposed rules was "not intended to confer on HEW any authority it does not already have under the act." *Id.*

The Tower Amendment passed the Senate, but was amended in conference (becoming the "Javits Amendment") to require the HEW Secretary (in place of the Commissioner of Education) to publish the proposed regulations and to replace the revenue-sport exemption by requiring the proposed regulations to "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *Compare* H.R. 69, §536 (Tower), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) *with* Pub. L. No. 93-380, §844, 88 Stat. 484, 612 (1974) (Javits). The conference committee did not indicate any other changes to the Senate bill. Conf. Rep. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271.

In another section of the same title of the Education Amendments of 1974, Congress "[r]ecogniz[ed] that the Nation's economic, political, and social security require a well-educated citizenry," "reaffirm[ed], as a matter of high priority, the Nation's goal of equal educational opportunity," and declare[d] it... the policy of the United States that every citizen is entitled to an education to meet his or her full potential." Pub. L. No. 93-380, §801, 88 Stat. 597.

Department of Education Organization Act. In splitting HEW into DOE and the Department of Health & Human Services ("HHS"), the Department of Education Organization Act, Pub. L.

No. 96-88, 93 Stat. 668 (1979) ("DEOA") reserved to HHS all functions not transferred to DOE. 20 U.S.C. §3508(b). DEOA §301 transferred "functions" from HEW and its officers to DOE and its officers. *See* 20 U.S.C. §3441(a)(1)-(6), (b). Specifically, §301(a)(1), (a)(5)-(6), and (b) transfer functions of education-related subordinate HEW officers and offices, which do not address HEW authority under either Title IX or the Javits Amendment. Likewise, §301(a)(4) transferred HEW functions under the Rehabilitation Act and administered by the Commissioner of Rehabilitation Services. And §301(a)(2) transferred all HEW functions under seventeen enumerated statutes, which do not include Title IX or the Javits Amendment. 20 U.S.C. §3441(a)(2) (listing transferred functions). Last, §301(a)(3) transferred "all [HEW] functions with respect to or being administered by the [HEW] Office of Civil Rights *which relate to functions transferred by this section.*" 20 U.S.C. §3441(a)(3) (emphasis added).

Regulatory Background

The "Three-Part Test" evolved through a series of interpretations of Title IX's original 1975 regulations. In summary, the regulatory standard changed from (a) equal opportunity, based on interest, with a mandate to assess the interest of both genders in 1975 to equal participation, based on enrollment, with no need to assess the interest of the "over-represented" gender (*i.e.*, men) in 1996 and beyond; (b) a non-prospective, non-binding document for complaints pending in 1979 to prospective "legal obligations" in 1996 and beyond; (c) subject to a regulatory and statutory prohibition against discrimination in 1975 and 1979 to safe harbors that

authorize gender-conscious cutting and capping solely to meet an enrollment-based quota in 1996 and 2003.

1975 Regulations. Unlike the statute, the 1975 regulations: require equal opportunity, based on interest and ability, 45 C.F.R. §86.41(c)(1); "require institutions to take the interests of both sexes into account in determining what sports to offer," 40 Fed. Reg. 24,128, 24,134 (1975); and authorize schools to do so "in any reasonable way the school considers appropriate," *id.* HEW's Secretary testified to Congress that "the interest and abilities of both sexes... obviously involves learning about those interests in one way or another." *1975 Hearing*, at 440.

1979 Policy Interpretation. Contrary to the 1975 regulations, the 1979 Three-Part Test would narrow schools' latitude to three options: (1) a quota based on enrollment ratios, (2) progress on the way to prong one, and (3) fully accommodating the underrepresented gender's interest. 44 Fed. Reg. 71,418. In doing so, however, HEW expressly (if obliquely) states that the document does not apply prospectively, 44 Fed. Reg. 71,414 (disavowing "a separate section on institutions' future responsibilities"), and instead refers future compliance to the interest-and-abilities section of the regulation, *id.* Archival documents from HEW incorporated into the complaint make clear that HEW very carefully and publicly contorted its document to avoid procedural requirements. *See*

CAJA 130-136.[5] In addition, throughout the 1980s, DOE interpreted prong three ("full accommodation") to mean accommodating the gender's interest to the same relative extent (*i.e.*, proportional to *interest*, not *enrollment*). CAJA 44-45.

1996 Clarification. In its press release announcing its 1996 clarification, DOE characterizes the Three-Part Test as "legal obligations." CAJA 43. Unlike the 1979 version, the 1996 version purports to be a prospective legal requirement. App. 106a ("The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test"). Further, unlike the 1979 version, the 1996 version's third prong requires full accommodation only of the underrepresented gender, changing the 1979 version's focus on relative accommodation. App. 123a-124a.

2003 Clarification. Unlike its 1996 version, the 2003 version makes prongs two and three safe harbors. App. 131a.

2005 Clarification. In addition to explaining the contours of DOE-acceptable surveys of athletic interest, the 2005 version clarifies that DOE did not consider the Fourteenth Amendment in its analysis. App. 135a.

---

[5] Concerned primarily that its document did not constitute an "interpretation" under GEPA, CAJA 110-136, HEW neglected to consider the breadth of "order," which this Court announced a year later. *FTC v. Standard Oil Co.*, 449 U.S. 232, 238, n.7 (1980).

REASONS TO GRANT THE WRIT

This litigation presents circuit splits on Title IX's preemption of constitutional review (Section I), the test for preliminary injunctions (Section III), the availability of laches to defendants with unclean hands (Section III), and strict versus intermediate scrutiny under Title IX (Section IV.A.4). Contrary to this Court's recent *Parents Involved* decision, the lower courts allowed numerical balancing as an end it itself for equal-protection analysis (Section IV.A.5). Finally, the litigation offers the opportunity for this Court to address important issues of deference to DOE's sub-regulatory amendments via clarification (Sections II.B-II.C, IV.A.1-IV.A.3) and multi-agency delegations generally (Section II.A). Most significantly, the writ should be granted because the circuits have reached an incorrect 9-0 unanimity on Title IX's Three-Part Test, based on DOE's ignorance of HEW's actions, which only this Court's supervisory power can correct.

I. TITLE IX DID NOT PREEMPT §1983 OR *EX PARTE YOUNG*

In affirming the denial of interim relief, the Fourth Circuit cited *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994), for the proposition that "[i]nsofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible." Citing *Kelley* for the

"impermissible collateral attack" doctrine in essence finds constitutional review preempted,[6] an issue on which the circuits are split. *Compare, e.g., Fitzgerald v. Barnstable School Comm.*, 504 F.3d 165, 179-80 (1st Cir. 2007); *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2nd Cir. 1998); *Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3rd Cir. 1993); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3rd Cir. 1990) *and Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996) (§1983 preempted) *with Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) *and Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (§1983 not preempted). The Court should resolve this split.

The notion that Title IX preempts §1983 – much less insulates school officers from review under *Ex parte Young* – is utterly foreign to the legislative history and common sense. This Court granted a writ of *certiorari* in *Fitzgerald v. Barnstable School Committee*, No. 07-1125 (U.S.), and the same

---

[6] At the outset, the panel's adoption of §1983 preemption is inappropriate when the Fourth Circuit *en banc* allowed Title IX and §1983 actions to proceed concurrently. *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 702 (4th Cir. 2007) (*en banc*). *Stare decisis* demands lower courts' respect across the board, not selectively. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999); *McMellon v. U.S.*, 387 F.3d 329, 332-33 (4th Cir. 2004); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993).

rationale warrants granting a writ of *certiorari* here.[7]

A. Title IX Did Not Preempt §1983

The "dividing line" that defines §1983's preemption is "the existence of a *more restrictive* private remedy for *statutory* violations," and "an *express,* private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under §1983." *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 122 (2005) (emphasis added). Here, Title IX provides no express remedy, no private remedy for regulatory violations beyond the statute's prohibition, and nothing more restrictive for statutory violations.

---

[7] This Court appears to lack Article III subject-matter jurisdiction to resolve the circuit split in *Fitzgerald* because, having already lost their Title IX claim on the merits, the Fitzgeralds will find that issue preclusion on the absence of intentional discrimination preordains their losing the §1983 action that they seek to bring. *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981). "For a court to pronounce upon the meaning or the constitutionality of a... federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires. Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101-02 (1998); *U.S. v. Troup,* 821 F.2d 194, 197 (3rd Cir. 1987) ("lack of subject matter jurisdiction goes to the very power of a court to hear a controversy;... [the] earlier case can be accorded no weight either as precedent or as law of the case") (*quoting Ala. Hosp. Ass'n v. U.S.,* 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original); *Orff v. U.S.,* 358 F.3d 1137, 1149-50 (9th Cir. 2004) (same); *accord Ctr. for Law & Educ. v. Dep't of Educ.,* 396 F.3d 1152, 1156 (D.C. Cir. 2005); *Rogers v. Stratton Indus.,* 798 F.2d 913, 917 (6th Cir. 1986).

This Court already has held that Title IX's *administrative* remedy does not preclude litigation. Indeed, both Title IX and §1983 actions proceed straight to district court, without administrative exhaustion. *Cannon v. Univ. of Chicago,* 441 U.S. 694, 706-08 (1979); *Smith v. Robinson,* 468 U.S. 992, 1012 & n.14 (1984). In finding an implied private action under §901(a), this Court expressly rejected arguments that §902's administrative remedy precludes private litigation, absent "other, more convincing, evidence that Congress meant to exclude the [court] remedy." *Cannon,* 441 U.S. at 711. Thus, unlike *Robinson,* 468 U.S. at 1012-13, private litigation does here not frustrate a statutorily contemplated administrative process that Congress intended to precede litigation.

Nor does Title IX's *statutory* remedy preclude §1983. Indeed, this Court expressly declined to "hold that the availability of a private judicial remedy... *conclusively* establishes[] a congressional intent to preclude §1983." *Abrams,* 544 U.S. at 122 (emphasis added). Instead, express statutory remedies raise mere "ordinary inference[s]" of exclusivity that plaintiffs may "overcome by textual indication[s], express or implicit, that the remedy is to complement, rather than supplant, §1983." *Id.* With Titles VI and IX, Congress expressly and implicitly indicated its intent to retain §1983.

In Title IX's Title VI template, Congress plainly desired to *extend* (not limit) enforcement of constitutional protections to federal recipients, and favorably viewed the Fourth Circuit's landmark *Simkins v. Moses H. Cone Memorial Hospital*

decision. *See Cannon,* 441 U.S. at 711-12 & n.48 (citing floor statements by Senators Humphrey, Pastore, Ribicoff, Allott, and Javits).

> Although it has been suggested that the state-action doctrine in *Simkins* is overbroad, there is no denying that the Title VI Congress assumed and approved the availability of private suits against many private recipients of federal funds.[8]

Cannon, 441 U.S. at 712 (citation omitted). A Congress that "assumed and approved" §1983 suits could scarcely have intended *sub silentio* to preempt §1983.

Indeed, §602 expressly contemplates enforcement "by any other means authorized by law," 42 U.S.C. §2000d-1, and the Senate deleted §601's "notwithstanding" clause from the House bill. *Compare* H.R. 7152, 88th Cong. §601 (1963) ("Notwithstanding any inconsistent provision of any other law, no person in the United States...") *with* 42 U.S.C. §2000d ("notwithstanding" clause deleted). Moreover, even if it preempts §1983, Title IX cannot prevent federal courts' reaching constitutional issues in cases over which they have jurisdiction. *Robinson,* 468 U.S. at 1012 n.15. Finally, an *implied* remedy cannot repeal an express remedy: "repeals by implication are disfavored, and this canon of

---

[8] *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 157 (1978), narrows *Simkins* for private recipients, which is irrelevant for state entities. *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 929 (1982).

construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) (interior quotations omitted).

For all the foregoing reasons, Title IX cannot preempt §1983. No-one with even passing familiarity with the legislative history of Title VI and Title IX would contend that compliance with a discriminatory federal policy insulates discrimination from judicial redress. Federal bureaucrats cannot, without much apparent thought, extinguish the Fourteenth Amendment by memorandum.

B. Title IX Did Not Preempt *Ex parte Young*

In suggesting that DOE's memoranda render EIA's challenge to JMU's actions "impermissible," App 13a, the Fourth Circuit goes beyond preempting §1983 and also seeks to preempt the venerable officer-suit exception to sovereign immunity. *Ex parte Young,* 209 U.S. 123 (1908). Congress certainly did not even consider that issue, and (in any event) lacks the constitutional authority to authorize unconstitutional behavior by recipients of federal funds. *U.S. v. Am. Library Ass'n,* 539 U.S. 194, 203 (2003); *South Dakota v. Dole,* 483 U.S. 203, 210-11 (1987). For the declaratory and injunctive relief that EIA seeks, *Ex parte Young* and §1331 provide the only cause of action that EIA needs to challenge JMU's misplaced reliance on a substantively and procedurally unlawful federal guidance:

> [A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports

> to act for the Government stays within the bounds of his authority.

F.C.I.C. v. Merrill, 332 U.S. 380, 384 (1947). Moreover, EIA and this litigation put JMU on notice that reliance on federal guidance would prove unavailing. *Maynard v. Cartwright,* 486 U.S. 356, 361 (1988) (claimed lack of notice "may be overcome in any specific case where reasonable persons would know that their conduct is at risk").

Insofar as Congressional spending-clause legislation (and *a fortiorari* DOE memoranda) cannot authorize unconstitutional conduct, nothing prohibits constitutional review. Even if Title IX preempts §1983, it does not preempt EIA's challenge to the lawfulness of JMU's and DOE's actions.

II. NO STATUTE DELEGATES OR TRANSFERS INTERPRETIVE AUTHORITY TO HEW OR DOE

The decisions below – and all of the Three-Part Test caselaw – rely on three 1970s-era statutes to find that DOE's policies warrant deference. None of these statutes delegates or transfers authority that warrants deference from the courts.

A. Title IX Did Not Delegate Authority

Senator Bayh's failed 1971 amendment explicitly delegated rulemaking authority only to HEW. 117 Cong. Rec. 30,399, 30,404 (1971); *accord id.* 30,407 (Sen. Bayh). Senator Bayh's 1972 amendment (which, with the House bill, became Title IX) delegates rulemaking authority to *all* federal agencies equally. 118 Cong. Reg. 5803 (1972). "Few principles of statutory construction are more

compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted).

The extra-circuit decisions that support the Three-Part Test rest on "*Chevron*" deference to DOE's interpretation of Title IX. Notwithstanding those decisions, EIA submits that either no deference or the lesser "*Skidmore*" deference applies to regulatory regimes that (like Title IX) provide identical authority to multiple agencies. *Compare Chevron, U.S.A., Inc. v. N.R.D.C.,* 467 U.S. 837, 843-44 (1984) *with Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944); *see Bragdon v. Abbott,* 524 U.S. 624, 642 (1998); *U.S. v. Mead Corp.,* 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hospital Ass'n,* 476 U.S. 610, 643 n.30 (1986) (plurality); *Wachtel v. O.T.S.,* 982 F.2d 581, 585 (D.C. Cir. 1993) (*Chevron* deference "inappropriate" to affirmative-action statute administered equally by four agencies). Particularly because Title IX merely implements the constitutional standard of intentional discrimination, courts should not defer to DOE.

B. §844 Did Not Delegate Authority

Because agencies axiomatically lack any authority not expressly delegated to them, *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988), and judicial deference applies only to actions within such delegations, *Chevron,* 467 U.S. at 865, the Javits Amendment cannot justify deference.

First, the Javits Amendment directs HEW's Secretary to issue merely a *proposed* regulation,

which commands no deference. *Matter of Appletree Markets,* 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen v. Shalala,* 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, F.D.A.,* 740 F.2d 21, 32-33 (D.C. Cir. 1984)) (same); *Utah Wilderness Alliance v. Dabney,* 222 F.3d 819, 829 (10th Cir. 2000). By requiring only proposed regulations, the Tower-Javits Amendment met the stated objective of "not... confer[ring] on HEW any authority it does not already have." 120 Cong. Rec. 15,323; Conf. Rep. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4271 (adopting Senate's rulemaking provision).

Second, assuming *arguendo* that it confers authority, the Javits Amendment confers only the one-time authority to issue a proposed rule within 30 days of the enactment of the Education Amendments of 1974. As such, courts would owe deference only to HEW's 1974 proposal, not to HEW's 1975 final rule, much less to agencies' subsequent actions, proposed or final. Unlike the broad delegation in *Chevron,* such temporary, special-circumstance delegations cannot elevate the delegate. *Cf. U.S. v. Eaton,* 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions he is not thereby transformed into the superior and permanent official").

Third, assuming *arguendo* that the Javits Amendment conferred authority for the Three-Part Test, the Javits Amendment's exclusive focus on *intercollegiate* athletics would leave HEW without deference for *interscholastic* athletics. Similarly, and

again assuming *arguendo* that the Javits Amendment conferred *any* authority on HEW, DOE still could not claim that authority: DEOA left any Javits Amendment delegation with HHS, not with DOE. *See* Section II.C, *infra*. Because Congress likely did not intend either to create an intercollegiate-interscholastic dichotomy or to crown HHS as the nation's Title IX czar, this Court should read the Javits Amendment not to have conferred any new authority.

C. DEOA Did Not Transfer Authority

In splitting HEW into DOE and HHS, Congress did not transfer HEW's interpretive authority to DOE. Nothing in DEOA §301 or elsewhere in the DEOA transfers Title IX rulemaking authority to DOE. DEOA §301(a)(1)'s laundry list of inferior HEW offices does not include the HEW Secretary, and DEOA §301(a)(2)'s laundry list of statutes does not include Title IX or the Javits Amendment. 20 U.S.C. §3441(a)(1)-(2). Because it applies only to "functions transferred by this section," DEOA §301(a)(3) cannot include Title IX (or the Javits Amendment) rulemaking authority, which "this section" (*i.e.*, §301) did not transfer. 20 U.S.C. §3441(a)(3). Moreover, as distinct from *enforcement* authority, HEW's *rulemaking* authority was administered by the *HEW Secretary,* and thus was not "being administered by the Office of Civil Rights," as required by §301(a)(3)'s terms.[9] Thus, like

---

[9] Had DEOA transferred HEW's Office of Civil Rights ("OCR") to DOE, as the Senate Bill proposed, one could make a

(Footnote cont'd on next page)

any other agency, DOE draws its rulemaking authority from Title IX itself, which authorizes and directs *each* federal agency to issue Title IX regulations. 20 U.S.C. §1682. Under this authority, DOE issued regulations upon its formation in 1980, 34 C.F.R. pt. 106, while HHS retained the original HEW regulations, 45 C.F.R. pt. 86. One of two situations applies: (1) as inheritor of all non-transferred HEW authority, HHS is the nation's Title IX czar, 20 U.S.C. §3508(b), or (2) consistent with their plain language and legislative histories, neither Title IX nor the Javits Amendment delegated special authority to HEW, HHS, or DOE.

As the Fourth Circuit noted, App. 3a, this Court has stated in a footnote that "HEW's functions under Title IX were transferred to [DOE]." *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 517 n.4 (1982). The *North Haven* footnote explains why DOE defended that litigation on *certiorari.*[10] Because nothing of substance hinged on whether HEW, HHS, or DOE defended the Title IX regulations on appeal,

---

(Footnote cont'd from previous page.)

strained argument that §301(a)(3)'s "relates-to" clause includes any "function" related to any authority wielded by OCR. But the Senate receded to the House in Conference, and DEOA created a new OCR within DOE instead of transferring HEW's OCR. H.R. Conf Rep. 96-459, 46-47, *reprinted in* 1979 U.S.C.C.A.N. 1612, 1626; *see* 20 U.S.C. §3413. The strained argument is neither availing nor available.

[10] The schools that challenged Title IX's application to employment received DOE (not HHS) funding under statutes listed in §301(a)(2).

this Court now should disregard its "fleeting footnote." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512-13 & n.9 (2006) (disregarding remarks made "*[e]n passant*" and in "fleeting footnote[s]" when "our decision did not turn on that characterization, and the parties did not cross swords over it"). As EIA already has explained, and as the fleeting footnote does not refute, the HEW-DOE-HHS transfer provisions transferred substantive authority under various education-related statutes, *see* 20 U.S.C. §3441(a)(2), but did not transfer HEW's Title IX or Javits Amendment rulemaking authority.

III. *BLACKWELDER* AND *QUINCE ORCHARD* MISSTATE THE TEST FOR INTERIM RELIEF

This Court and the other twelve circuits evaluate preliminary injunctions under a four-part balancing test. *Winter*, __ U.S. at __ (slip op., at 10). Under *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), the Fourth Circuit frontloads its analysis by balancing the harms. *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 868 (4th Cir. 2001) ("our decisions... contravene Supreme Court precedents by overvaluing the inquiry into the relative equities") (Luttig, J., concurring). If the balance tips decidedly to the plaintiff, the Fourth Circuit grants preliminary relief for merits questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and more deliberate investigation. *In re Microsoft Corp.*, 333 F.3d 517, 526 (4th Cir. 2003). That is not enough.

Where *Blackwelder* provides interim relief too easily, EIA faced the opposite problem: "the court

cannot simply ignore the period of delay between [JMU's] decision and the filing of this action." App. 42a (emphasis added, citing *Quince Orchard Valley Citizens Assoc. v. Hodel,* 872 F.2d 75, 80 (4th Cir. 1989)). *Quince Orchard* held that delay in seeking interim relief could "indicate an absence of the kind of irreparable harm required to support a preliminary injunction" under *Blackwelder. Quince Orchard,* 872 F.2d at 80. *Quince Orchard* is as hyper-restrictive as *Blackwelder* is hyper-permissive.

Although the circuits are split, equitable defenses should not protect defendants with unclean hands. *Compare, e.g., Bird v. Centennial Ins. Co.,* 11 F.3d 228, 234 (1st Cir. 1993); *Atari Games Corp. v. Nintendo of America, Inc.,* 975 F.2d 832, 846 (Fed. Cir. 1992); *and Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F.3d 813, 825-26 (7th Cir. 1999) *with Alcatel USA, Inc. v. DGI Technologies, Inc.,* 166 F.3d 772, 794-95 (5th Cir. 1999). Given JMU's uncontested months of footdragging and years of unlawful secret meetings, a court not only *can* disregard EIA's timing, but *should* disregard it.

IV. EIA IS ENTITLED TO INTERIM RELIEF

If it grants the writ of *certiorari* on all four questions presented and, on the merits, rules against EIA on each of the other three questions, this Court nonetheless still should find EIA entitled to interim relief, based on its strong likelihood of success on the merits. In particular, EIA is likely to succeed on its "novel" procedural arguments, App. 13a, the merits of which no court ever has addressed. Indeed, the lower courts completely ignored EIA's GEPA argument, which was HEW's primary focus. CAJA

110-136. While the lower courts' arguments are demonstrably wrong (and thus an abuse of discretion), a court also abuses its discretion by ignoring an argument that is demonstrably right.

A. EIA Is Likely to Succeed on Merits

Under the Three-Part Test cases cited by the lower courts, preliminarily injunctions are appropriate to protect disadvantaged teams. App. 11a-12a, 44a-53a. Although EIA presents procedural and substantive reasons to reject their definition of "disadvantage," no party has quarreled with these cases' holdings that courts must protect students from discrimination. Procedurally, if this Court recognizes the equal-opportunity fulcrum at the regulations' interest-based opportunity (not the Three-Part Test's enrollment-based participation), JMU's actions become untenable. Substantively, all of those courts improperly deferred to an interpretation that the agency itself never adopted and that, as applied, plainly violates both Title IX and the Fourteenth Amendment.

1. Rule Change Required Rulemaking

As summarized in the Regulatory Background, *supra*, the regulatory standard purportedly changed from (a) 1975's equal interest-based opportunity, after assessing both genders' interest, to equal enrollment-based participation, with no need for schools like JMU to assess men's interest; (b) 1979's non-prospective, nonbinding document to a prospective legal obligation; (c) 1979's prohibition against regulatory and statutory discrimination to safe harbors that authorizes gender-conscious cutting and capping solely to meet an enrollment-

based quota; and (d) 1979's "participation opportunities" to 1996's "participants." Even if *substantively* lawful, such changes require notice-and-comment rulemaking. 5 U.S.C. §§551(4)-(5), 553(b).[11]

Although the district court considered it "twenty-five years [of]... longstanding and consistent administrative interpretation[]," App. 62a-63a, the Three-Part Test hatched by DOE's neglect in 1996, not HEW's design in 1979, and changed at least twice since 1996. Further, because it was nonbinding, the 1979 Three-Part Test could not have established safe harbors that excuse intentional discrimination. Indeed, an interpretation of §86.41(c) – or §86.41(c)(1) – cannot displace §86.41(a), which prohibits intentional discrimination in athletics, independent of §86.41(c). 45 C.F.R. §86.41(a), (c). A binding Three-Part Test with safe harbors is altogether foreign to HEW's 1979 action. Oblivious to the fine distinctions that HEW drew in 1979, DOE's subsequent "clarifications" actually *create* legal requirements, which federal agencies

---

[11] Because §902 requires agencies to proceed by rule, regulation, and order, note 4, *supra,* Title IX precludes agencies' *ultra vires* policy-formulation methods even more strictly than the APA does. Agencies cannot exempt themselves from the APA by promulgating authority to consider "other factors" and then inventing new factors at will. *Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3rd Cir. 1969) (agency cannot "replace the statutory scheme with a rule-making procedure of its own invention"); *U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989).

cannot accomplish by memorandum. U.S. CONST. art. I, §1 ("All legislative Powers [vested] in a Congress"); *Loving v. U.S.*, 517 U.S. 748, 771 (1996).

Instead, "notice and comment is required if the rule makes a substantive impact on the rights and duties of the person subject to regulation." *Reynolds Metals Co. v. Rumsfeld,* 564 F.2d 663, 669 (4th Cir. 1977). In *American Mining Congress v. M.S.H.A.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the D.C. Circuit adopted a four-part test to identify substantive rules that requires notice-and-comment rulemaking: (1) whether absent the rule the agency would have an adequate legislative basis for enforcement; (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior substantive rule. This case ably demonstrates that the Three-Part Test changed the rules: before the cuts, JMU complied with §86.41(c)(1), but violated the Three-Part Test, whereas JMU's cuts complied with the Three-Part Test, but violated §86.41(c)(1). Obviously, the rule change requires a rulemaking.

The right to comment enables the public to convince agencies to change an unwise ("arbitrary or capricious") or unlawful ("not in accordance with the law") course. 5 U.S.C. §706. "The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking." *Chocolate Mfrs. Ass'n v. Block,* 755 F.2d 1098, 1103 (4th Cir. 1985). Here, neither HEW

nor DOE has ever responded to comments that the Three-Part Test violates Title IX and the Constitution. *See, e.g.,* App. 100a (1996 Clarification's declining to respond to comments that questioned Three-Part Test's lawfulness). Assuming that DOE in 1996 was unaware of HEW's intentional non-finality in 1979, DOE's 1996 "clarification" *accidentally created* the Three-Part Test, without ever considering its lawfulness.

The district court reasoned that "the challenged policies 'are interpretive guidelines that [DOE] was not obligated to issue in the first place.'" App. 64a (*quoting Nat'l Wrestling Coaches Ass'n v. DOE,* 366 F.3d 930, 940 (D.C. Cir. 2004). *First,* that is a *non sequitur* because GEPA, APA, and Title IX obligated DOE *not to issue* those guidelines without the required procedures. *Second,* the *NWCA dictum* does not reflect the law of the *D.C. Circuit,* much less the Fourth Circuit. *Independent U.S. Tanker Owners Comm. v. Lewis,* 690 F.2d 908, 918 (D.C. Cir. 1982) (agency "not required by law to promulgate any rules limiting its discretion [but] was nonetheless bound by [APA] when it decided to do so").[12]

---

[12] When self-described interpretive rules or policy statements legally required notice-and-comment rulemaking, the agency's having provided notice or taken comment cannot satisfy the APA. *Nat'l Tour Brokers Ass'n v. U.S.,* 591 F.2d 896, 899 & nn.8-10 (D.C. Cir. 1978); *McLouth Steel Prod. Corp. v. Thomas,* 838 F.2d 1317, 1323 (D.C. Cir. 1988) ("agency may not introduce a proposed rule in [the] crabwise fashion" of discussing the issue in a *Federal Register* preamble). HEW recognized this by expressly and publicly disavowing that

(Footnote cont'd on next page)

2. Non-Rule Guidance Is an Order

Like its Title VI template, Title IX requires agencies to act by rule, regulation, or order of general applicability, and provides that such actions do not take effect until approved by the President. 42 U.S.C. §2000d-1; 20 U.S.C. §1682. As explained, the legislative history makes clear that presidential approval meant signed by the President in the *Federal Register, and* Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreaching. *See* note 4 & accompanying text, *supra.* For a contemporaneous and longstanding Executive interpretation, EIA notes that President Johnson signed the initial seven agencies' Title VI regulations *seven times,* 29 Fed. Reg. 16,274, 16,279, 16,280, 16,283, 16,284, 16,287, 16,293, 16,297, 16,298, 16,303, 16,305, 16,309 (1964), as well as amendments, 32 Fed. Reg. 14,555, 14,557 (1967). President Ford signed HEW's initial Title IX regulations, 40 Fed. Reg. 24,137.

The legislative history forecloses the argument that Congress did not mean what it plainly said. The House bill permissively authorized agencies to proceed by rule, regulation, or order. H.R. 7152, 88th

---

(Footnote cont'd from previous page.)

notice and comment on the 1979 Policy Interpretation qualified as notice-and-comment rulemaking. CAJA 136 n.* (HEW's "voluntary effort" at notice and comment did not qualify as rulemaking), 140-41, 304-05 (publicizing HEW's position). Significantly, that position enabled HEW to sidestep comments that the Policy Interpretation was unlawful in 1979.

Cong. §602 (1963) ("Such action *may* be taken by... rule regulation or order") (emphasis added). Responding to concerns over agencies' overreaching, Senator Dirksen's substitute bill amended §602 to its current form. 110 Cong. Rec. 11,926, 11,930 (1964). To repeat, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Cardoza-Fonseca,* 480 U.S. at 442-43 (citation omitted).

Significantly, Senator Dirksen needed these concessions against administrative overreaching to break a Senate filibuster. *Mohasco Corp. v. Silver,* 447 U.S. 807, 819-20 (1980); *E.E.O.C. v. Commercial Office Products Co.,* 486 U.S. 107, 117 (1988) (Civil Rights Act's opponents feared "the steady and deeper intrusion of the Federal power"). Where such "language was clearly the result of a compromise," courts must "give effect to the statute as enacted." *Mohasco Corp.,* 447 U.S. at 818-19.

As the record demonstrates, DOE's predecessor openly and intentionally bypassed otherwise-applicable procedures because the Three-Part Test was neither binding nor a prospective standard for Title IX compliance. CAJA 130-139. As EIA advised JMU in March, before JMU's cuts took effect, "JMU is steering itself to a mirage, not a safe harbor." CAJA 103; *see also Lujan v. Franklin County Bd. of Educ.,* 766 F.2d 917, 923 (6th Cir. 1985) (presidential approval "a prerequisite to [an agency memorandum's] validity as a binding general order"); *Ranjel v. City of Lansing,* 417 F.2d 321, 323 (6th Cir.

1969) (agency guidance without presidential approval "does not rise to the dignity of federal law"). The Fifth Circuit provides more deference, but nonetheless requires compliance with §602 and encourages schools to use other tools if necessary to comply with the statute or Constitution. *Bd. of Pub. Instruction of Taylor County v. Finch*, 414 F.2d 1068, 1075-77 & n.13 (5th Cir. 1969); *U.S. v. Jefferson County Bd. of Ed.*, 380 F.2d 385, 390 (5th Cir. 1967) (*en banc*).[13]

Rejecting these authorities, the district court relied on two untenable, extra-circuit district-court decisions that found the Three-Part Test exempt from presidential approval as a guideline, as distinct from a rule or order. 65a-66a. An agency can act only by rule or by order. 5 U.S.C. §551(4), (6); *FTC v. Standard Oil Co.*, 449 U.S. 232, 238, n.7 (1980). There is no middle ground: issuing a non-rule "guideline" *is an order*. 5 U.S.C. §551(6). Whether an unapproved *rule* or an unapproved *order*, the Three-Part Test never took effect under §902.

3. Courts Failed to Consider GEPA

Beyond APA's familiar notice-and-comment requirements and §902's presidential-approval

---

[13] In *Sch. Dist. v. H.E.W.*, "HEW assert[ed] that Title VI does not require Presidential approval of these regulations, as they are procedural only and do not define what constitutes discriminatory practices prohibited by Title VI." 431 F.Supp. 147, 151 (E.D. Mich. 1977). Under HEW's contemporaneous view, then, the Three-Part Test required presidential approval as a substantive amendment.

requirement, in 1979, GEPA provided that no HEW "regulation" – defined broadly as "any generally applicable rule, regulation, guideline, interpretation, or other requirement" – would take effect until 45 days after presentment to Congress. 20 U.S.C. §1232(a)(1), (d)(1) (1979) (App. 78a). Because HEW intentionally and expressly avoided GEPA's laying-before requirement, CAJA 304-05, the Policy Interpretation never took effect under GEPA.

4. Quota-Driven Cuts Violate Title IX

Because they must "honor the clear meaning of a statute, as revealed by its language, purpose, and history," courts must hold that agencies "lack[] the authority" "to impose an affirmative-action obligation on all recipients of federal funds" when "neither the [statute's] language, purpose, nor history... reveals an intent to impose [one]." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411-12 (1979). *Davis* reflects the law far more accurately than do the extra-circuit decisions that mistakenly defer to a Three-Part Test that HEW never adopted.

Indeed, numerical, group-based safe harbors that excuse harm to individuals injured along the way to group-based bottom lines are foreign to discrimination law. *Connecticut v. Teal*, 457 U.S. 440, 453-57 (1982) (reaching a presumptively nondiscriminatory statistical "bottom line" does not excuse discrimination in attaining that bottom line). Although arising under Title VII, *Teal* applies equally to all federal anti-discrimination laws, which protect individuals, not groups. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (applying Title VII precedents to Title IX). Even if it

establishes proportionality *as Title IX compliant,* the 1979 Policy Interpretation nowhere insulates JMU's discriminatory actions *to reach* proportionality.

Finally, the circuits are split on the scrutiny that applies to evaluating policies under Title IX. The courts below and others looked to the intermediate scrutiny that would apply under this Court's equal-protection analysis. *See, e.g., Cohen v. Brown Univ.,* 101 F.3d 155, 182 (1st Cir. 1996); App 59a; App. 10a. By contrast, other courts have analyzed Title IX under the strict scrutiny that applies to its Title VI template. *See, e.g., Jeldness v. Pearce,* 30 F.3d 1220, 1227 (9th Cir. 1994) ("Because Title IX and Title VI use the same language, they should, as a matter of statutory interpretation, be read to require the same levels of protection and equality"). The Three-Part Test is even less defensible under strict scrutiny than under intermediate scrutiny.

5. Fourteenth Amendment Requires Interest-Based Analysis

If the Court allows as-applied constitutional challenges (Section I, *supra*), EIA will prevail.

First, the Three-Part Test's interest (numerical balancing) is not a permissible governmental interest under this Court's equal-protection analysis. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 127 S.Ct. 2738, 2757 (2007) (plurality); *id.* at 2794 (Kennedy, J., concurring in part and concurring in the judgment). Government must look to the qualified applicant pool (interest), not the general population (enrollment). *Mayor v. Educational Equality League,* 415 U.S. 605,

620-21 (1974). JMU's reliance on the Three-Part Test is constitutionally unavailing, as applied.

Second, because each team seeks to enforce Title IX's equal-opportunity regulations – which exceed the scope of the statutory prohibition – they may resort to 42 U.S.C. §1988(a)'s adoption of not inconsistent state law for equal-protection cases under §1983. Virginia has adopted Title IX *regulatory* violations as statutory violations, VA. CODE ANN. §2.2-3901, which makes the regulations enforceable. At the least, all ten teams deserve reconsideration under the interest-based standard.

Third, for swimming, track, and cross-country, JMU unlawfully denied its students' First-Amendment educational and associational rights, which triggers *strict* scrutiny. The suggestion that EIA first raised this by post-hearing brief (App. 67a) begs the question whether the judge read EIA's papers. *See* CAJA 10-11, 144-45, 150-51, 152-53, 156, 202, 218, 313-15, 320-23 (raising issue in complaint, opening brief, reply briefs, affidavits, oral argument, and oral testimony). When such First-Amendment issues arise in equal-protection actions, this Court has the "obligation" to consider them. *Lyng v. Int'l Union,* 485 U.S. 360, 365-66 (1988). That a women-only swimming pool results from a statute modeled on one designed to end whites-only fountains is remarkable. Even worse, that segregation injures women as well as men.

B. EIA's Members Face Irreparable Harm

The opportunity to compete in intercollegiate athletics is fleeting. As the district court recognized, EIA's members on the cut teams face imminent and

irreparable harm in lost opportunity to compete and (in the case of the reciprocal swimming and track programs) association, App. 41a-42a (describing affidavits and testimony as "compelling" and "moving"), which a court can neither calculate nor reduce to money damages. These "innocent victims," App. 14a, 73a, are not bound by extra-circuit decisions, which do not compel courts in the Fourth Circuit, much less this Court, to follow DOE's misdirection. Because these students unquestionably suffer irreparable harm, the courts below could ignore that harm only by misconstruing the law applicable to the EIA's delay in bring suit (Section III, *supra*) and overstating the harm to JMU (Section IV.C, *infra*). Because the courts below erred on both counts, the harms to EIA clearly outweigh the harms to JMU.

C. Harm to JMU Is Merely Financial

The record demonstrates that – apart from the financial cost of the teams, which an injunction bond could address – the harm to JMU consists of trivial administrative tasks. CAJA 369-71. When interim relief merely requires the non-moving party to maintain the status quo and to refrain from violating the law, moreover, that harm is not cognizable under the balancing test. *D.O.L. v. Wolf Run Mining Co.*, 452 F.3d 275, 280 (4th Cir. 2006) (finding no harm to defendant under balancing test where "the harm to a party by granting or denying a preliminary injunction is essentially the same as the consequence to a particular party in winning or losing on the merits"); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 615 (D.C. Cir. 1980)

("results do not constitute substantial harm for the purpose of delaying injunctive relief" where "[they] are no different from the Department's burdens under the statutory scheme").

Here, EIA seeks merely to preserve the status quo until the Court can reach the merits. If EIA obtains an injunction but ultimately loses on the merits, JMU will not suffer harm remotely comparable to the irreparable harm faced by EIA's members. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002) (financial harm to defendants holds "little consequence" in balance of hardships); *Frank's GMC Truck Ctr. v. General Motors Corp.*, 847 F.2d 100, 102 (3rd Cir. 1988) (same). Indeed, if EIA loses its merits challenge to DOE's Title IX regime, JMU also must comply with DOE's "scholarship proportionality" test, which will cost JMU *more* in new scholarships than it would cost to reinstate the ten teams. CAJA 57. Thus, interim relief will not cost JMU *anything:* it saves money.

D. Public Interest Favors Interim Relief

The public interest favors granting interim relief to comply with the applicable legal standards and because JMU has no legitimate countervailing interest.

First, as the district court acknowledges, the public-interest prong collapses into the merits. App. 73a; 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4 ("statute prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction"). If the equal-opportunity

regulations trump the procedurally defective Three-Part Test (Sections IV.A.1-IV.A.3, *supra*), or DOE's interest in numerical balancing cannot justify discrimination (Section IV.A.5, *supra*), the public interest cannot support JMU.

Second, courts have cited *Blackwelder,* 550 F.2d at 189, for the public interest in preserving the status quo until a court reaches the merits. *Maryland Undercoating Co. v. Paine,* 603 F.2d 477, 481 (4th Cir. 1979); *Valdez v. Applegate,* 616 F.2d 570, 572 (10th Cir. 1980). Even if *Blackwelder* is too lenient, the "basic 'public interest' is further enhanced where, as here, the private controversy may possibly vindicate public policy." *Washington v. Reno,* 35 F.3d 1093, 1103 (6th Cir. 1994) ("greater public interest in having governmental agencies abide by the federal laws that govern their... operations").

"Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Yakus v. U.S.,* 321 U.S. 414, 441 (1944) (interior quotations omitted). In such cases, the public interest requires balancing the harms, which favors EIA's student-athletes over JMU's administrative burdens. *Marshall,* 628 F.2d at 616 ("balance must be struck in favor of the protection of children"). Title IX, the Fourteenth Amendment, and their Virginia counterparts unquestionably provide a

public-policy interest in education free from discrimination.[14]

Third, as explained in Section IV.A.5, *supra,* the only legitimate government interest (avoiding intentional discrimination) has little or no relationship to an enrollment-based participation quota that disregards interest. Indeed, as explained in Section IV.A.1, *supra,* the Title IX regulations (and thus Virginia law) require allocating opportunity to interest, not participation to enrollment. Given such disconnects between government action and legitimate governmental interests, courts reject circular attempts to elevate governments' desired action (here, an enrollment-based quota) as their compelling interest. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.,* 502 U.S. 105, 120 (1991). The public interest favors reinstatement.

---

[14] Three circuits suggest "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs." *Williams,* 998 F.2d at 175; *Neal v. Bd. of Tr.,* 198 F.3d 763, 767 (9th Cir. 1999); *Cohen,* 101 F.3d at 175-76. Historically a women's college, JMU bypasses that argument. *Cohen v. Brown Univ.,* 991 F.2d 888, 900 n.17 (1st Cir. 1993). Moreover, "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan v. U.S.,* 522 U.S. 398, 403 (1998). The statute prohibits differential treatment and the regulation requires equal opportunity: reinstatement honors both.

CONCLUSION

The petition for writ of *certiorari* should be granted.

November 18, 2008

Respectfully submitted,

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
* Counsel of Record

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869

No. __-____

IN THE
Supreme Court of the United States

EQUITY IN ATHLETICS, INC.,

PETITIONER,

v.

DEPARTMENT OF EDUCATION, *ET AL.*,

RESPONDENTS.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF *CERTIORARI*

Lawrence J. Joseph*
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: (202) 669-5135
Fax: (202) 318-2254

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869
Fax: (505) 848-1882

* Counsel of Record

TABLE OF CONTENTS

Equity in Athletics, Inc. v. Dep't of Educ.,
No. 07-1914 (4th Cir. 2008) (decision) 1a
Equity in Athletics, Inc. v. Dep't of Educ.,
No. 07-1914 (4th Cir. 2008) (judgment) 15a
Equity in Athletics, Inc. v. Dep't of Educ.,
504 F.Supp.2d 88 (W.D. Va. 2007) (decision).... 16a
Equity in Athletics, Inc. v. Dep't of Educ.,
No. 5:07-0028-GEC (W.D. Va. 2007) (order) 74a
U.S. CONST. amend. V 75a
U.S. CONST. amend. XIV, §1 ..... 75a
5 U.S.C. §551(4)-(6) 75a
5 U.S.C. §553(b)-(d) 76a
20 U.S.C. §1231 (1979) 78a
20 U.S.C. §1681(a)-(b) 79a
20 U.S.C. §1682 ..... 80a
20 U.S.C. §1683 ..... 80a
42 U.S.C. §1983 ..... 81a
42 U.S.C. §1988(a) 81a
Pub. L. No. 93-380, §844, 88 Stat. 612 (1974) 82a
VA. CODE ANN. §2.2-3901 ..... 83a
45 C.F.R. §86.41(a)-(c)(1) 83a
Title IX of the Education Amendments of 1972;
a Policy Interpretation; Title IX and
Intercollegiate Athletics,
44 Fed. Reg. 71,413 (1979) 84a
Clarification of Intercollegiate Athletics Policy
Guidance: The Three-Part Test
(Jan. 16, 1996) 99a
Further Clarification of Intercollegiate Athletics
Policy Guidance Regarding Title IX Compliance
(Jul. 11, 2003) 129a
Additional Clarification of Intercollegiate Athletics
Policy: Three-Part Test — Part Three
(Mar. 17, 2005) 135a

United States Court of Appeals for the
Fourth Circuit.

Equity in Athletics, Inc.,

Appellant,

v.

Department of Education, *et al.*,

Appellees.

No. 07-1914
Argued Mar. 18, 2008
Decided Aug. 20, 2008

Before: MICHAEL and GREGORY, Circuit Judges, and David R. HANSEN, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Senior Judge HANSEN wrote the opinion, in which Judge MICHAEL and Judge GREGORY joined.

OPINION

Equity in Athletics, Inc. ("EIA") sought a preliminary injunction to prevent James Madison University ("JMU") from eliminating seven men's sports and three women's sports from its intercollegiate athletic program. EIA claimed that JMU intentionally discriminated against male athletes in violation of the United States Constitution and in violation of Title IX of the

Education Amendments of 1972. Because the district court did not abuse its discretion in concluding that EIA failed to meet the *Blackwelder*[1] factors, we affirm the district court's denial of EIA's motion for a preliminary injunction.

I.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ."20 U.S.C. § 1681(a). Title IX did not specifically address its application to athletics, and in 1974, Congress directed the Secretary of Health, Education, and Welfare ("HEW") to promulgate regulations, "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *McCormick v. Sch. Dist. of Mamaronek,* 370 F.3d 275, 287 (2d Cir.2004) (quoting Education Amendments of 1974, Pub.L. No. 93-380, § 844, 88 Stat. 484, 612 (1974)). HEW followed the rulemaking procedures in promulgating 45 C.F.R. § 86.41 in 1975, which provides that "[a] recipient which operates or sponsors interscholastic, intercollegiate,

---

[1] *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir.1977).

club or intramural athletics shall provide equal athletic opportunity for members of both sexes." § 86.41(c). One of the ten factors listed as assisting in that determination is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."§ 86.41(c)(1).[2]

EIA does not contest the validity of 45 C.F.R. § 86.41. Rather, at issue here is a Policy Interpretation issued by HEW in 1979 intended to provide further guidance for the 1975 regulation and subsequent clarifications of the Policy Interpretation. The Policy Interpretation provides, in part, that:

> [I]nstitutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

---

[2] Congress divided HEW into two agencies in 1979, the Department of Health and Human Services and the Department of Education ("DOE")."HEW's functions under Title IX were transferred ... to the [DOE]." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 516 n. 4, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (citing 20 U.S.C. § 3441(a)(3)). The DOE subsumed functions from five separate departments and subsequently consolidated the regulations of those five departments into one title of the Code of Federal Regulations at Title 34. DOE recodified 45 C.F.R. § 86.41 at 34 C.F.R. § 106.41.

> (a) Compliance will be assessed in any one of the following ways:
>
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments....

44 Fed.Reg. 71,413, 71,418 (Dec. 11, 1979) ("1979 Policy Interpretation"). This provision, which also lists two other methods of compliance not at issue here, has come to be known as the "Three-Part Test." The DOE issued a Clarification to the 1979 Policy Interpretation in 1996, indicating that institutions needed to comply with only one part of the Three-Part Test; DOE issued a Further Clarification in 2003, expressing that the 1979 Policy Interpretation did not require reductions to men's teams or the use of quotas; and it issued an Additional Clarification in 2005, reiterating that each part of the Three-Part Test was an equally sufficient and separate method of complying with Title IX.

James Madison University (JMU) is a state-sponsored university in Virginia and receives federal funds. In an effort to comply with Title IX with respect to its athletic program, JMU's Board of Visitors voted on September 29, 2006, to eliminate seven men's sports (archery, cross country, gymnastics, indoor and outdoor track, swimming, and wrestling) and three women's sports (archery, fencing, and gymnastics) to obtain proportionality between the gender makeup of its athletic programs and its undergraduate enrollment. At the time,

JMU's undergraduate population was divided 61% female and 39% male, while its student athletes were 51% female and 49% male. The proposed cuts relied on the first part of the Three-Part Test and were designed to put JMU's student-athlete population in a similar male/female ratio as its general student population. The Board issued a press release explaining its decision the same day. It also issued a "Title IX Statement" on February 8, 2007, further addressing the reasoning behind the cuts, which were to be effective as of July 1, 2007.

Athletes, coaches, and fans formed EIA, a not-for-profit organization, to fight the proposed cuts. EIA filed suit in federal court against the DOE, the Secretary of Education, the Assistant Secretary for Civil Rights, the United States (collectively "the federal defendants"), and various John Does on March 19, 2007. EIA challenged the Title IX interpretive guidelines, specifically the Three-Part Test and its subsequent clarifications, as violating the Constitution, Title IX, and the Administrative Procedures Act and as permitting colleges to engage in the kind of gender-conscious decisionmaking that Title IX was intended to prohibit. EIA sought declaratory and injunctive relief that would vacate the allegedly unlawful guidelines and would require the DOE to issue new rules consistent with Title IX and the Constitution.

EIA subsequently requested JMU to defer implementing the decision to cut the programs until EIA's challenge to the federal guidelines was complete. JMU declined, and EIA amended its

complaint to include JMU as a defendant on June 1, 2007. EIA filed a motion for a preliminary injunction on June 15, 2007, addressed solely against JMU, seeking to prevent JMU from taking any additional steps to eliminate the targeted programs. After holding an evidentiary hearing, the district court denied the motion on August 21, 2007. See *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F.Supp.2d 88 (W.D.Va.2007). EIA brings this interlocutory appeal. See 28 U.S.C. § 1292(a)(1).

II.

We review the district court's denial of a motion for a preliminary injunction for an abuse of discretion, accepting its factual findings unless they are clearly erroneous and reviewing its legal conclusions de novo. See *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch.*, 373 F.3d 589, 593 (4th Cir.2004)."In determining whether to grant a preliminary injunction, a court must balance: (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if it is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest."Id. (referring to the *Blackwelder* factors).

Our court places the most emphasis on the first two factors, the balancing of the harms. See *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir.2003). If the balance is fairly equal, a stronger showing of likelihood of success is required. However, if the balance of harm tilts more decidedly toward the moving party, the party can meet the

likelihood of success factor by raising questions about the merits that are sufficiently "serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." Id. We are mindful nonetheless that the four factors "are intertwined and each affects in degree all the others." *Blackwelder,* 550 F.2d at 196; see also *Quince Orchard Valley Citizens Ass'n v. Hodel,* 872 F.2d 75, 79 (4th Cir.1989) ("[I]f the likelihood of success is remote, there must be a strong showing of the probability of irreparable injury to justify the issuance of the injunction."(internal marks omitted)). We give deference to the district court's balancing of the harms. See *U.S. Dep't of Labor v. Wolf Run Mining Co.,* 452 F.3d 275, 289 (4th Cir.2006) ("In balancing the relative harms, ... the district court did not abuse its discretion."); *Faulkner v. Jones,* 10 F.3d 226, 229 (4th Cir.1993) ("Balancing the relative harms of the parties on a scale adjusted by the plaintiff's likelihood of success on the merits, we now conclude that the district court did not abuse its discretion in issuing the preliminary injunction....").

The district court determined that the balance of harms was not so decidedly in EIA's favor that a lesser showing of likelihood of success on the merits was warranted. See *Ciena Corp. v. Jarrard,* 203 F.3d 312, 323 (4th Cir.2000) (noting that the likelihood of success on the merits can be reduced when the balance of harms "tilts sharply and clearly in the plaintiff's favor" (internal marks omitted)). The district court recognized the harm to the student-

athletes of not being able to compete in the sport and at the university of their choice, but it also noted that the student-athletes would not lose their scholarship funding if they chose to stay at JMU and that the students were free to transfer to other colleges offering their chosen sport, which some of the students had done, so that those athletes were still able to compete at the college level. On the other side of the scale, the district court recognized the harm to JMU of not having control over which athletic programs it offered and the administrative difficulty and the cost to JMU of having to reinstate the eliminated programs. The court gave significant weight to the timing of EIA's request for a preliminary injunction. JMU approved and publicized the program cuts on September 29, 2006, and issued its Title IX Statement on February 8, 2007. EIA filed its initial suit against the federal defendants on March 19, 2007, but it did not make JMU a party to the suit until June 1, 2007. Further, the motion for a preliminary injunction was not filed until June 15, 2007, a mere fifteen days prior to the date the cuts were scheduled to go into effect. In anticipation of the upcoming college year, coaches had already been terminated, competitions had been cancelled, and $350,000 in funding had been reallocated to other athletic programs. See *Quince Orchard Valley Citizens Ass'n,* 872 F.2d at 79-80 ("[A] period of delay may ... indicate an absence of the kind of irreparable harm required to support a preliminary injunction."(internal marks omitted)). Upon review, the balance of the harms here is not so one-sided that we can say that the district court

either abused its discretion or clearly erred in its identification and assessment of the harms. Cf. *Cohen v. Brown Univ.*, 991 F.2d 888, 904-05 (1st Cir.1993) (*Cohen I*) (holding that the record supported, though it did not compel, the district court's finding of irreparable injury to women athletes seeking to enjoin Brown University from cutting its volleyball and women's gymnastics teams against Brown's claim of financial harm and upholding the district court's conclusion against an abuse of discretion standard); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir.1984) (accepting district court's balancing between potential Olympic athletes' harm in missing once-in-a-lifetime Olympic opportunity and the incremental burden on the Olympics organization committee if it had to organize two additional track and field events for women where the district court found the athletes' harm outweighed the harm to the Olympic committee, but denied a preliminary injunction based on the failure to show a likelihood of success on the merits).

Absent an "imbalance of hardship in favor of the plaintiff, then the probability of success begins to assume real significance, and interim relief ... require[s] a clear showing of a likelihood of success." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir.2001) (internal marks omitted). EIA spends most of its time trying to convince us that the 1979 Policy Interpretation was not properly promulgated, and therefore it is void ab initio and is not entitled to any deference. We are limited in this

interlocutory appeal, however, to addressing only those issues relevant to the denial of the motion for a preliminary injunction, a motion addressed only against JMU. EIA's claims against JMU allege that JMU engaged in intentional discrimination in violation of Title IX, the Constitution's equal protection guarantee, substantive due process of law, and the Virginia Human Rights Act. Specifically, EIA argues that Title IX requires that schools provide "equal opportunity" based on "athletic interest," not "equal participation" based on "enrollment." EIA also argues that using gender as a factor to determine which programs to cut amounts to intentional gender discrimination.[3] We focus our attention on these claims against JMU in assessing whether EIA has sufficiently established a likelihood of success on the merits to entitle it to a preliminary injunction against JMU.

---

[3] EIA also raises a First Amendment right of association claim for athletes participating in sports that were not cut but who wish to train with the athletes whose sports were cut. EIA clarified during oral argument that it was not asserting a separate First Amendment cause of action, but raised the issue for purposes of arguing that the Equal Protection claim deserved a heightened level of scrutiny. However, EIA offers no authority for such an argument, and we note that gender-based Equal Protection claims already enjoy a heightened level of scrutiny. See *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir.2001) ("[A] gender classification is subject to heightened scrutiny.").

Courts have consistently rejected EIA's underlying claim that equal opportunity under § 86.41 should be tied to expressed interest rather than actual participation. See *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 767 (9th Cir.1999) (reversing grant of preliminary injunction, noting that "Appellees' argument that equal opportunity is achieved when each gender's athletic participation roughly matches its interest in participating is hardly novel," and that "[s]everal courts of appeals have considered and rejected Appellees' approach as fundamentally inconsistent with the purpose of Title IX"); *Boulahanis v. Bd. of Regents,* 198 F.3d 633, 638-39 (7th Cir.1999) ("[T]he elimination of men's athletic programs is not a violation of Title IX as long as men's participation in athletics continues to be 'substantially proportionate' to their enrollment."), cert. denied, 530 U.S. 1284, 120 S.Ct. 2762, 147 L.Ed.2d 1022 (2000); *Cohen v. Brown Univ.*, 101 F.3d 155, 174 (1st Cir.1996)(*Cohen II*) ("Brown's relative interests approach cannot withstand scrutiny on either legal or policy grounds, because it disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests." (internal citations and marks omitted)), cert. denied, 520 U.S. 1186, 117 S.Ct. 1469, 137 L.Ed.2d 682 (1997). Courts have also rejected Equal Protection claims similar to EIA's constitutional claims against JMU. See *Neal,* 198 F.3d at 773 ("Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports

programs as they are in student bodies."); *Boulahanis,* 198 F.3d at 639 (rejecting equal protection challenge and holding that "[t]he elimination of sex-based discrimination in federally-funded educational institutions is an important government objective, and the actions of Illinois State University in eliminating the men's soccer and men's wrestling programs were substantially related to that objective"); *Kelley v. Bd. of Trs.,* 35 F.3d 265, 272 (7th Cir.1994) ("To the extent that plaintiffs' argument is that Title IX and the applicable regulation ... are unconstitutional, it is without merit."), cert. denied, 513 U.S. 1128, 115 S.Ct. 938, 130 L.Ed.2d 883 (1995).

Although many of these cases rely, at least in part, on the 1979 Policy Interpretation and its Three-Part Test, many of them rejected claims that the Policy Interpretation was inconsistent with Title IX itself or violated the Constitution. See *McCormick,* 370 F.3d at 290 (finding the 1979 Policy Interpretation to be "both persuasive and not unreasonable" in implementing Title IX); *Miami Univ. Wrestling Club v. Miami Univ.,* 302 F.3d 608, 615 (6th Cir.2002) (finding the 1979 Policy Interpretation consistent with Title IX); *Neal,* 198 F.3d at 770-71 ("[T]he plain meaning of the nondiscrimination principle set forth in 20 U.S.C. § 1681(a) does not bar remedial actions designed to achieve substantial proportionality between athletic rosters and student bodies."); *Cohen I,* 991 F.2d at 899 (holding that the 1979 Policy Interpretation "stands upon a plausible, if not inevitable, reading of

Title IX"); see also *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 n. 4 (8th Cir.2002) ("[T]he [Policy] [I]nterpretation has guided the Office for Civil Rights' enforcement of nondiscrimination in athletics for over two decades, without change from Congress. No court has ever held it to be invalid.").

Even if the promulgation of the 1979 Policy Interpretation involved procedural irregularities as EIA argues, the cases discussed above raise a serious doubt about whether EIA will be successful on the merits of its claims against JMU that JMU violated Title IX or the Constitution in using gender to select which athletic programs to cut. See *Kelley*, 35 F.3d at 272 ("[I]nsofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible."). While EIA's claims against the federal defendants concerning the procedural validity of the 1979 Policy Interpretation raise novel issues, EIA offers no case directly on point that supports its challenge to the procedural validity of the 1979 Policy Interpretation. In the end, there are no cases directly supporting EIA's procedural challenges to the 1979 Policy Interpretations, and yet nearly every circuit in the country has rejected challenges similar to EIA's underlying complaint against JMU, i.e., that JMU violated Title IX and the Constitution when it used gender to determine which athletic programs to cut. We agree with the district court that EIA has failed to establish a likelihood of success on its claims

against JMU sufficient to entitle it to a preliminary injunction.

The final factor to be considered on a motion for a preliminary injunction is the public interest. The district court sympathized with the student-athletes affected by the cuts, characterizing them as "innocent victims" of Title IX' s remedial effects. Given the current state of the law related to Title IX's effect on athletic programs, however, the district court did not clearly err in determining that the public interest favored JMU's ability "to chart [its] own course in providing athletic opportunities without judicial interference or oversight, absent a clear showing that [it is] in violation of the law." 504 F.Supp.2d at 112 (internal marks omitted).

III.

EIA has failed to establish that the district court abused its discretion in applying the *Blackwelder* factors and in rejecting EIA's motion for a preliminary injunction. We affirm the district court's judgment.

AFFIRMED

United States Court of Appeals for the
Fourth Circuit.

Equity in Athletics, Inc.,

Appellant,

v.

Department of Education, *et al.*,

Appellees.

No. 07-1914
(5:07-cv-00028-gec)

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

United States District Court for the
Western District of Virginia
Harrisonburg Division

Equity in Athletics, Inc.,

Plaintiff,

v.

Department of Education, *et al.*,

Defendants.

No. 5:07-0028-GEC
Filed Aug. 21, 2007

Before: GLEN E. CONRAD, District Judge.

MEMORANDUM OPINION

Equity in Athletics, Inc. ("Equity") is a not-for-profit Virginia nonstock corporation, whose members include coaches, student-athletes, fans, booster clubs, parents, save-our-sport groups, and/or alumni, affiliated with certain Virginia colleges and universities, including James Madison University ("JMU"). In this action for declaratory and injunctive relief, Equity challenges interpretive guidelines implementing Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), on the grounds that they violate the Constitution, Title IX, and the Administrative Procedure Act ("APA"). Equity alleges that these interpretive guidelines, namely the 1979 Policy Interpretation ("Three-Part Test") and its 1996, 2003, and 2005 Policy Clarifications, authorize or mandate the very discrimination that Title IX prohibits, by permitting

institutions to engage in the gender-conscious capping or cutting of male athletic programs. Equity seeks declaratory and injunctive relief to vacate the allegedly unlawful guidelines and to require the United States Department of Education ("DOE") to issue new rules consistent with Title IX and the Constitution.

Subsequent to the filing of this action, Equity amended its complaint to include JMU and certain JMU officials as defendants and to directly challenge JMU's decision to eliminate ten athletic programs. Equity alleges that the decision to eliminate the men's swimming and diving, track and field, cross country, and wrestling programs impermissibly discriminates against men, in violation of Title IX, the Equal Protection Clause of the Fourteenth Amendment, the Constitution of Virginia, and the Virginia Human Rights Act. Equity further alleges that the decision to eliminate the men's and women's archery and gymnastics programs, and the women's fencing program, constitutes arbitrary discrimination in violation of the substantive due process protections of the Constitution of the United States and the Constitution of Virginia. In addition to filing an amended complaint, Equity filed a motion for preliminary injunction, directed solely at JMU, seeking to prevent the university from taking additional steps to eliminate the aforementioned athletic programs.

The case is presently before the court on Equity's motion for preliminary injunction. The court held a

hearing on the motion on July 19, 2007. For the following reasons, the motion will be denied.

Factual and Procedural Background

During the 2006-2007 academic year, JMU fielded men's and women's archery, men's baseball, men's and women's basketball, men's and women's cross country, women's fencing, women's field hockey, men's football, men's and women's golf, men's and women's gymnastics, women's lacrosse, men's and women's soccer, women's softball, men's and women's swimming and diving, men's and women's tennis, men's and women's track and field, women's volleyball, and men's wrestling. On September 29, 2006, JMU's Board of Visitors voted to downsize the university's athletic department to attain proportionality between the gender makeup of its athletic programs and that of its undergraduate enrollment. As reported in the approved minutes, the Board of Visitors took the following action:

> On motion of Mr. Rivers, seconded by Mr. Foster[,] approved the elimination of the following men's sports: archery, cross country, gymnastics, indoor track, outdoor track, swimming and wrestling; and the following women's sports: archery, fencing, and gymnastics to be in compliance with the proportionality test of Title IX.

(Equity Hearing Ex. M.)

That same day, JMU issued a press release, which read as follows:

James Madison University's Board of Visitors voted today to approve a plan to bring the JMU Athletics program into compliance with Title IX.

The plan will take effect July 1, 2007, when the following varsity teams will be eliminated:

Men's

Archery

Cross Country

Gymnastics

Indoor Track

Outdoor Track

Swimming

Wrestling

Women's

Archery

Fencing

Gymnastics

With 28 varsity teams, the JMU Athletics program ties for the rank of seventh in terms of the number of teams among all 327 Division I schools nationally.

"The JMU Athletics program is unusually large for a public university of our size," said Joseph Damico, rector of the JMU Board of Visitors. "With so many teams, we faced an insurmountable challenge coming into compliance with Title IX. Fundamentally,

that is why the Board voted today for this plan."

The proportionality requirements of Title IX mandate that collegiate athletics programs mirror each school's undergraduate population in terms of gender. As of the fall semester 2006, JMU's proportions place it fundamentally out of compliance with federal law:

Overall Enrollment

Female 61%

Male 39%

Athletics Participation

Female 50.7%

Male 49.3%

Jeff Bourne, JMU athletics director, said, "We explored every avenue in search of an alternative to this action. Lamar Daniel, a well-known consultant on Title IX compliance, has worked closely with us and he believes that this plan is our most viable alternative for reaching compliance with Title IX."

Once this plan is fully implemented, total participation in athletics will move to 61 percent female and 39 percent male, in alignment with current student enrollment. The university will then have 18 intercollegiate sports:

Men's

Baseball
Basketball
Football
Golf
Soccer
Tennis
Women's
Basketball
Cross Country
Field Hockey
Golf
Lacrosse
Soccer
Softball
Swimming
Tennis
Track, Indoor
Track, Outdoor
Volleyball

This decision affects 144 student-athletes currently participating in these sports, as well as three full-time and eight part-time coaches. "Now that the Board has voted to enact this plan, our main concern is with our affected student-athletes and coaches," said Bourne. "We are taking great care to preserve the financial guarantees already made to our student-athletes. If you are a student-athlete on an affected team and you

> are receiving a scholarship, you will continue to receive that scholarship until you graduate."
>
> Currently, eight students on the rosters of the 10 affected teams receive a total of $13,500 in scholarships. Access to sports-medicine and academic-advising programs also will be available to them. Any affected student-athletes who decide to transfer to another program will be provided with full assistance regarding the transfer process. Affected coaches will receive severance packages appropriate to the university's policies and procedures.
>
> All of the financial resources recovered from the implementation of this plan will be redirected to provide the full complement of NCAA scholarships for women's golf, tennis and swimming. Partial scholarship funding will return to men's golf and tennis, with a plan to enhance to full funding by 2011.

(Amend. Compl. Ex. 3.)

On February 8, 2007, JMU issued a "Title IX Statement." That statement explained as follows:

> The decision to eliminate ten sports at the university was difficult for the board of visitors and the administration. Alternatives were proposed, considered, and analyzed to deal with the need to come into compliance with Title IX. Unfortunately, 144 students and 11 coaches are adversely affected by this decision. The primary reason for the decision

was to bring JMU into compliance with the law. Any solution that would require the addition of sports beyond the current 28 teams was deemed unacceptable. Although we regret the elimination of these 10 teams, as of July, 2007, the university will continue to manage and support a comprehensive intercollegiate athletic program of 18 sports.

Institutions may demonstrate compliance with Title IX by satisfying one of three "prongs" delineated by the Office of Civil Rights. The first test requires the university to demonstrate that its ratio of male to female students is mirrored in its ratio of male to female athletes. The second test requires the university to "demonstrate a history and continued practice of program expansion for the underrepresented sex." The third test requires the university to "fully and effectively accommodate the interests and abilities of the underrepresented sex."

It was the judgment of the administration and the board of visitors that the institution could not/would not satisfactorily meet the second or third test. The university could not demonstrate a history or continued pattern of program expansion to accommodate the needs of the under-represented gender, having added only one women's sport since 1990. And, while a survey is one tool to determine interest, we are already aware of student interest in varsity status, which the

Office of Civil Rights has indicated is a sufficient indicator of un-met interest. Given its commitment to not add sports and its desire to be in compliance with Title IX, the university was left with the need to comply with the proportionality prong.

Three of the sports that will be eliminated as varsity sports were women's teams. In addition to achieving compliance with Title IX, sustainability of the existing teams was an issue that had to be addressed by the university. None of the eliminated women's teams are conference sports. JMU is one of only 2 Division I schools in the country that has a varsity archery team. In addition, the NCAA does not sponsor a national championship in archery. The fencing team has faced difficulty maintaining enough participants to qualify for NCAA competition, and has had 4 coaches in the past 5 years. Only one other state institution in the Commonwealth has a varsity gymnastics team, so the majority of competitions are outside the conference and the state. These issues made continuation of archery, fencing and gymnastics as varsity sports unrealistic.

It has been suggested that the implications of the board's decision would be that only 6 scholarships are available for men's tennis, soccer, baseball and golf. This is not accurate. Proportionality of scholarship dollars is calculated relative to roster size

and headcount, not relative to opportunities for participation. Teams must meet roster numbers to compete, and they cannot exceed scholarship numbers set by the NCAA.

The $550,000 previously allocated to the eliminated sports will be used to fully fund the remaining women's sports and to partially fund the men's golf and tennis teams. This means that men's tennis and golf scholarships will actually increase, and men's soccer and baseball will remain unchanged.

While some student-athletes may choose to transfer to another institution, those students who are interested will have the opportunity to continue their athletic endeavors at the club level. In some cases, clubs already exist that are associated with a particular sport. In other cases, we encourage the creation of such a club. The Athletic Department has recommended that the university provide funding to the associated clubs over the next three years to facilitate the transition to club status.

Again, while the board and the administration regret that this difficult decision had to be made, the information available to us indicated that this was the most viable alternative for the continuation of the Athletics program at JMU.

(Amend. Compl. Ex. 4.)

Equity filed its original complaint on March 19, 2007. By letter dated March 23, 2007, Equity advised JMU of the legal issues raised in the original complaint, and requested that JMU defer implementing the planned cuts pending the resolution of the instant action. On April 4, 2007, JMU declined Equity's request to postpone the elimination of the selected athletic programs. Equity subsequently filed an amended complaint, naming JMU as a defendant, on June 1, 2007. On June 15, 2007, Equity filed its motion for preliminary injunction, which is presently before the court.

The court held a hearing on Equity's motion on July 19, 2007. On August 1, 2007, Equity filed a motion for leave to file a post-hearing brief. The court granted the motion, and the post-hearing brief was filed on that same date. The JMU defendants filed a response to Equity's post-hearing brief on August 6, 2007, and the DOE defendants filed a response on August 8, 2007. Equity's motion for preliminary injunction is now ripe for review.

Statutory and Regulatory Background

A. Title IX

"Enacted in response to evidence of 'massive, persistent patterns of discrimination against women

in the academic world,'" *National Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930, 934 (D.C.Cir.2004) (quoting 118 Cong. Rec. 5,804 (1972) (statement of Sen. Bayh)),[1] Title IX prohibits educational institutions that receive federal financial support from engaging in sex-based discrimination. See Education Amendments of 1972, Pub. L. No. 92-318, Title IX, §§ 901-907, 86 Stat. 235, 373-375 (codified at 20 U.S.C. § 1681, et seq.). Section 901(a) provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Section 901(b), in turn, provides as follows:

---

[1] See also Neal v. Bd. of Tr. of the Cal. State. Univ., 198 F.3d 763, 766 (9th Cir.1999) ("Title IX was Congress's response to significant concerns about discrimination against women in education."); Cohen v. Brown Univ., 991 F.2d 888, 901 (1st Cir.1993) ("Congress [held] 'extensive hearings on higher education' when Title IX was pending, in the course of which 'much testimony was heard with respect to discrimination against women in our institutions of higher education.' ") (quoting H.R.Rep. No. 554, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2462, 2511).

> Nothing contained in [section 901(a)] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any supported program or activity, in comparison with the total number or percentage or that sex in any community, State, section or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1681(b).

Section 902 of the statute "authorize[s] and direct[s]" each agency empowered to extend financial assistance to any educational program or activity "to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682. The statute further provides that "[n]o such rule, regulation, or order

shall become effective unless and until approved by the President." Id.

"After Title IX was passed, there were efforts to limit the effect of the statute on athletics programs." *McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 287 (2d Cir.2004). In 1974, Senator John Tower proposed an amendment that would have exempted revenue-producing intercollegiate sports from Title IX's coverage. Id. (citing 120 Cong. Rec. 15,322-15,323 (1974)). However, this proposed amendment was not enacted. Id. Instead, "[l]ater that year, Congress enacted a provision known as the Javits Amendment, which instructed the Secretary of Health, Education, and Welfare ('HEW') to 'prepare and publish ... proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition on sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.' " Id. (quoting Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974)).

B. HEW's 1975 Implementing Regulations

On June 20, 1974, HEW, the DOE's predecessor, published proposed regulations implementing Title IX in the Federal Register, which contained provisions addressing Title IX's application to athletic programs and provided an opportunity for public comment. 39 Fed.Reg. 22,227, 22,236 (June 20, 1974). After considering over 9,700 comments,

suggestions, and objections, HEW published final regulations implementing Title IX on June 4, 1975. 40 Fed.Reg. 24,128 (June 4, 1975). The regulations were approved by President Gerald Ford. 40 Fed.Reg. at 24,137. Once the regulations were published by HEW, Congress had forty-five days to disapprove them. *McCormick,* 370 F.3d at 287 (citing 40 Fed.Reg. at 24,128). "During this time, Congress held hearings on the regulations over the course of six days." Id. (citing *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor,* 94th Cong. (1975)). The regulations went into effect on July 21, 1975, "after Congress declined to disapprove them." Id. (citing 40 Fed.Reg. at 24,137).

The regulations prohibit sex-based discrimination in any interscholastic, intercollegiate, club, or intramural athletic program offered by a recipient of federal funds. 45 C.F.R. § 86.41(a) (subsequently codified at 34 C.F.R. § 106.41(a)) ("1975 Regulations"). While the regulations explicitly authorize recipients to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport,"45 C.F.R. § 86.41(b); 34 C.F.R. § 106.41(b), the regulations require recipients to "provide equal athletic opportunity for members of both sexes." 45 C.F.R. § 86.41(c); 34 C.F.R. § 106.41(c). The regulations specify ten factors, among others, that must be considered in determining whether equal opportunities are available. Id. The first of those ten

factors, which lies at the heart of this action, is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." Id.

C. The 1979 Policy Interpretation

On December 11, 1978, HEW published a Proposed Policy Interpretation for public comment. 43 Fed.Reg. 58,070, 58,071 (Dec. 11, 1978). At that time, HEW had received nearly 100 complaints against more than 50 colleges. Id. Consequently, HEW designed the Policy Interpretation to "provide a framework within which those complaints [could] be resolved, and to provide institutions of higher education with additional guidance on the requirements of the law relating to intercollegiate athletic programs." Id.

Following the publication of the Proposed Policy Interpretation, HEW received over 700 comments and visited eight universities "to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses." 44 Fed.Reg. 71,413, 71,413 (Dec. 11, 1979). On December 11, 1979, HEW published a Final Policy Interpretation, the general purposes of which included "clarif[ying] the meaning of 'equal opportunity' in intercollegiate athletics ... [and] provid[ing] guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory." Id. at 71,414. Of particular importance here, the Policy Interpretation contains the following guidance with respect to the

regulatory requirement that educational institutions "effectively accommodate the interests and abilities of members of both sexes":

> In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.
>
> a. Compliance will be assessed in any one of the following ways:
>
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest[s] and abilities of the members of that sex; or
>
> (3) Where members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities

> of the members of that sex have been fully and effectively accommodated by the present program.

Id. at 71,418. These three methods of assessing compliance subsequently became known as the "Three-Part Test."

D. The Department of Education Organization Act

In 1979, Congress divided HEW into the Department of Health and Human Services ("HHS") and the Department of Education ("DOE"). See Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (1979) (codified at 20 U.S.C. §§ 3401-3510). "HEW's functions under Title IX were transferred ... to the Department of Education," *N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 517 n. 4, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (citing 20 U.S.C. § 3441(a)(3)), and the regulations implementing Title IX were subsequently recodified without substantive change at 34 C.F.R. Part 106.[2]

---

[2] The Department of Education Organization Act expressly provides that:

> All orders, determinations, rules, [and] regulations ... which have been issued, made, granted, or allowed to become effective by the President, [or] any Federal department or agency or official thereof, ... in the

(Footnote cont'd on next page)

The regulations governing athletics have remained in effect without substantive change since that time. The DOE is the "princip[al] locus of ongoing enforcement activity," *Cohen v. Brown University,* 991 F.2d 888, 895 (1st Cir.1993), and courts "treat [the DOE] as the administrative agency charged with administering Title IX," *McCormick,* 370 F.3d at 287 (citing Id.).

E. The Civil Restoration Act of 1987

In 1984, the United States Supreme Court held that Title IX was "program-specific," in that the receipt of grants by some students at Grove City College did not trigger institution-wide coverage under Title IX, and that only the financial aid program could be regulated under Title IX. *Grove City College v. Bell,* 465 U.S. 555, 573-574, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). In response, Congress

---

(Footnote cont'd from previous page.)

> performance of functions which are transferred under this Act to the Secretary or the Department, and ... which are in effect at the time this Act takes effect, *shall continue in effect* according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with the law by the President, the Secretary, or other authorized official....

20 U.S.C. § 3505(a) (emphasis added).

passed the Civil Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687), which reestablished institution-wide coverage of Title IX. Specifically, the Act provides that an educational institution as a whole must comply with Title IX's requirements, if any part of the institution receives federal funds. Id. Thus, the Act "mak[es] it crystal clear that Title IX applies to athletic programs operated by any school receiving federal funding for any of its educational programs and activities, and not just to those athletic programs which directly received federal funds." *National Wrestling Coaches Ass'n v. United States Dep't. of Educ.*, 263 F.Supp.2d 82, 94 (D.D.C.2003).

F. The 1996 Clarification

On September 20, 1995, in response to questions about the regulations implementing Title IX and the 1979 Policy Interpretation, the DOE released a letter from Norma V. Cantu, the DOE's Assistant Secretary for Civil Rights. The "Dear Colleague" letter enclosed a Draft Clarification of portions of HEW's 1979 Policy Interpretation and asked for comments as to whether the clarification "provides the appropriate clarity in areas that have generated questions." (DOE Initial Brief, Ex. 1.) The letter was circulated to over 4,500 interested parties. In addition, the DOE published a Notice in the Federal Register announcing the availability of the Draft Clarification. 60 Fed.Reg. 51,460 (Oct. 2, 1995). After reviewing over 200 public comments, the DOE

released a final version of the Clarification on January 16, 1996. (Equity Initial Brief, Ex. S.)

The letters transmitting both the draft and final versions of the Clarification emphasized that the DOE was providing additional clarification on, not revisiting, the Three-Part Test. The Clarification provides specific factors that guide an analysis of each part of the Three-Part Test, as well as examples to demonstrate how these factors will be considered. The Clarification confirms that institutions need to comply only with any one part of the Three-Part Test to provide non-discriminatory participation opportunities for individuals of both sexes, and the letters accompanying both the draft and final versions of the Clarification emphasized that institutions are not required to cap or eliminate participation opportunities for men.

G. The 2003 Further Clarification

The DOE issued a Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance on July 11, 2003. (Equity Initial Brief Ex. U.) In the Further Clarification, the DOE emphasizes the flexibility of the Three-Part Test, and clarifies that nothing in Title IX or the Three-Part Test requires the cutting or reduction of men's teams or the use of quotas. The DOE encourages schools to take advantage of the Three-Part Test's flexibility and to determine which part best suits their individual situations. The DOE also emphasizes that the reduction of men's teams is a disfavored practice.

H. The 2005 Additional Clarification

On March 17, 2005, the DOE issued an Additional Clarification to explain some of the factors it considers when investigating a recipient's program in order to make a determination under the third prong of the Three-Part Test. (DOE Initial Brief, Subst. Ex. 4.) In the Additional Clarification, the DOE reiterates that each part of the three-part test is an equally sufficient and separate method of complying with Title IX.

Equity's Claims

Equity's amended complaint includes the following claims: (1) the Three-Part Test unlawfully establishes a disparate impact standard and unlawfully authorizes intentional discrimination in violation of the equal protection component of the Due Process Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, Title IX, and the Title IX regulations; (2) the Three-Part Test and its subsequent Clarifications unlawfully amended the Title IX regulations without the required notice and comment rulemaking; (3) the Three-Part Test, its subsequent Clarifications, and the DOE's Title IX regulations are not in effect, because they were not approved by the President; and (4) the JMU athletic cuts are substantively and procedurally unlawful. Specifically, with respect to its fourth claim, Equity alleges that the JMU defendants eliminated ten athletic teams for the express purpose of attaining enrollment proportionality, in violation of Title IX's statutory and regulatory requirements, the Virginia Human Rights Act, and the substantive due process

and equal protection provisions of both the Constitution of the United States and the Constitution of Virginia.

Equity's Motion for Preliminary Injunction

As previously stated, Equity seeks a preliminary injunction preventing JMU from taking additional steps to eliminate the selected athletic programs. The court held a hearing on Equity's motion on July 26, 2007. During the hearing, the court received affidavits and exhibits into evidence; heard testimony from Jennifer Chapman, a JMU student-athlete who graduated in May of 2007, and Coach Bill Walton, the director of JMU's track and field program; and heard arguments from Equity, the JMU defendants, and the DOE defendants.

A. Legal Standard

A preliminary injunction is considered "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir.1992) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir.1989)). In deciding whether to grant a preliminary injunction, courts in the Fourth Circuit use the test set forth in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir.1977). See *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir.2002). This test requires courts to consider four factors: (1) the likelihood of irreparable harm to the plaintiff if preliminary injunctive relief is denied; (2) the likelihood of harm

to the defendants if the requested relief is granted; (3) the plaintiff's likelihood of succeeding on the merits of the action; and (4) the public interest. *Direx Israel, Ltd.*, 952 F.2d at 812; see also *Blackwelder*, 550 F.2d at 193-95.

The plaintiff bears the burden of establishing that these factors support granting a preliminary injunction. *Direx Israel, Ltd.*, 952 F.2d at 812. The first two factors are the most important. Id. at 817. "If the hardship balance tilts sharply and clearly in the movant's favor, the required proof of likelihood of success is substantially reduced." Id. On the other hand, "if the balance of hardships is substantially equal as between the plaintiff and defendant[s], then 'the probability of success begins to assume real significance, and interim relief is more likely to require a clear showing of a likelihood of success.'" *Scotts Co.*, 315 F.3d at 271 (quoting *Direx*, 952 F.2d at 808).

B. Application

1. Balance of the Harms

The first factor in the *Blackwelder* test controls the court's initial inquiry: "the court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is

denied."[3] Id. at 271. Such "irreparable harm" must be both actual and imminent and can be neither remote nor speculative. *Direx,* 952 F.2d at 812.

In addressing this issue, Equity presented evidence of the harm that would be inflicted upon student-athletes whose teams were chosen for elimination, as well as the harm that would be inflicted upon athletes on the continuing women's

---

[3] The court notes that in response to Equity's motion for preliminary injunction, the JMU defendants suggest that Equity's delay in seeking preliminary injunctive relief, alone, provides a sufficient basis for denying the motion. The court disagrees with this proposition. The Fourth Circuit has indicated that "any delay attributable to plaintiffs in initiating a preliminary injunction request, coupled with prejudicial impact from the delay, should be considered when the question of irreparable harm to plaintiffs is balanced against harm to defendants." *Candle Factory, Inc. v. Trade Assocs. Group,* 23 Fed.Appx. 134, 138 (4th Cir.2001) (explaining *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel,* 872 F.2d 75, 80 (4th Cir.1989)). However, the Fourth Circuit has emphasized that courts are "not require[d] ... to find, as a matter of law, that the plaintiff suffered no irreparable injury because it delayed in initiating its request for a preliminary injunction." Id. Thus, while the court will consider the effects of any delay attributable to Equity in balancing the harms to the parties, the court will not deny Equity's motion solely on the basis of such delay.

swimming and diving ("swimming") and track and field ("track") teams.

For those students whose teams were chosen for elimination, the harm that will be suffered if the preliminary injunction is not granted is that they will be unable to complete their intercollegiate athletic careers at JMU, the school of their choice. Those athletes who are on athletic scholarships will not lose them and, like some athletes have chosen to do, they are free to transfer to other colleges or universities who offer their particular intercollegiate athletic programs. This is not to downplay the anger and heartbreak that was obviously felt by athletes whose teams were chosen for elimination or to suggest that transferring provides a simple or ideal solution. Indeed, the athletes' desire to complete their undergraduate education and intercollegiate athletic careers at JMU is completely understandable. However, "Title IX does not establish a right to participate in any particular sport in one's college and there is no constitutional right to participate in intercollegiate ... athletics." *Gonyo v. Drake Univ.*, 837 F.Supp. 989, 994 (S.D.Iowa 1993); see also *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir.2002).

Although the court believes that the evidence of harm to athletes on the eliminated teams is very compelling, the court also heard moving testimony from Jennifer Chapman, a recent JMU graduate and former captain of the women's cross country team. Chapman described, in detail, the harm that would

be inflicted upon athletes on the continuing women's swimming and track teams. Chapman emphasized that the men's and women's swimming and track teams compete and travel together, and that each program is essentially "one big family." Chapman also emphasized that the track program's throws coach and pole vault coach had been eliminated as a result of the cuts, and that the remaining women would lose the benefit of training with male athletes. Additionally, Chapman testified that the elimination of the men's swimming and track teams would impact the school's ability to recruit female swimmers and track athletes.

On the other side of the scale, while the court disagrees with the JMU defendants' proposition that Equity's delay, alone, provides a sufficient basis for denying the instant motion, see footnote 3, supra, the court cannot simply ignore the period of delay between the Board of Visitors' decision and the filing of this action. See *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir.1989) (explaining that while "a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction," any delay attributable to the plaintiff in initiating a preliminary injunction may be considered when balancing the harm to the plaintiff against the harm to the defendants). More than five months elapsed between the date of the Board of Visitors' decision and the date on which this action was filed, and nearly three months elapsed between the filing of the original complaint and the filing of the motion for preliminary injunction.

During this period of delay, the university took a number of actions that it normally would not have taken, and did not take a number of actions that it normally would have taken, based on the fact that certain athletic programs would no longer exist on July 1, 2007. Several coaches have been terminated, competitions have been cancelled, and funds totaling nearly $350,000 from the eliminated programs have been reallocated to other programs for coaching salaries and scholarships.[4] Additionally, no further competitions have been scheduled for the eliminated athletic programs, no athlete recruitment has taken place for the eliminated programs, and no efforts have been made to establish the eligibility of the eliminated programs or their athletes. While Coach Walton heavily downplayed the significance of some of the administrative hurdles that JMU would face if the university was ordered to reinstate the eliminated programs, and opined that the eliminated programs could be reinstated without any insurmountable problems, granting the preliminary injunction would nonetheless override the university's own judgment as to how to apportion its resources and what its athletic offerings will be.

---

[4] The court notes that additional funds from the eliminated programs are available for club team sponsorships.

While "[a]cademic freedom, of course, does not immunize defendants from civil liability, including injunctive relief, for any violations of the law, ... courts should be very cautious about overriding, even temporarily, a school's decisions [as to its athletic offerings], especially absent a showing that plaintiffs are likely to ultimately prevail." *Gonyo,* 837 F.Supp. at 994.

In applying the *Blackwelder* test, the "[w]eighing of harms is no simple task." *Direx,* 952 F.2d at 812. This is especially true in this case, given the particular nature of the harms at issue. While the harms identified by Equity may indeed be more emotionally compelling, the court is unable to conclude that the balance of hardships "tilt[s] decidedly" in favor of Equity. Id. at 818. Consequently, "a strong showing of likelihood of success" on the merits is required. Id.

2. Likelihood of Success

In addressing Equity's likelihood of success on the merits, the court must first recognize that a number of Circuits have addressed many of the same issues raised by Equity, namely whether the Three-Part Test set forth in the 1979 Policy Interpretation violates Title IX or the applicable regulations; whether the Three-Part Test is entitled to deference; and whether the proportionality prong of the Three-Part Test offends constitutional principles of equal protection.

"Every court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance

by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case)." *Neal v. Bd. of Tr. of the Cal. State Univ.*, 198 F.3d 763, 769-770 (9th Cir.1999); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 898 n. 15 (1st Cir.1993) ("*Cohen I*") ("Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent)."); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.1993) ("We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs.... Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population."); *Kelley v. Board of Trustees*, 35 F.3d 265, 272 (7th Cir.1994) ("And despite plaintiffs' assertions to the contrary, neither the regulation nor the policy interpretation run afoul of the dictates of Title IX."); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir.2002) (holding that the decision to eliminate

men's athletic programs did not violate Title IX, since "[t]he statute focuses on opportunities for the underrepresented gender, and does not bestow rights on the historically overrepresented gender, and it is well-established that classification by gender is not a per se violation of Title IX"); *Chalenor v. Univ. of North Dakota,* 291 F.3d 1042 (8th Cir.2002) ("[A]lthough Title IX does not require proportionality, the statute does not forbid it either. And the gender make-up of athletic participation is certainly relevant to a determination of whether a school is in compliance with Title IX.").

Additionally, every Circuit, in reviewing the Three-Part Test set forth in the 1979 Policy Interpretation, has concluded that it is entitled to substantial deference, since it is an agency's considered interpretation of its own regulations. See *Cohen I,* 991 F.2d at 896-897; *Roberts,* 998 F.2d at 828; *Kelley,* 35 F.3d at 271; *Cohen v. Brown University,* 101 F.3d 155, 173 (1st Cir.1996) ("*Cohen II*"); *Neal,* 198 F.3d at 770; *Miami Univ. Wrestling Club,* 302 F.3d at 615.

Likewise, every Circuit, which has considered the constitutionality of the proportionality prong of the Three-Part Test, has held that it does not offend constitutional principles of equal protection. In *Cohen I,* 991 F.2d 888, the "watershed" case involving Title IX and university athletics, Brown University appealed from the district court's issuance of a preliminary injunction ordering Brown to reinstate its women's gymnastics and volleyball programs, pending the resolution of the plaintiffs'

claim that the proposed cutbacks violated Title IX. *Cohen I,* 991 F.2d at 891. Brown challenged the validity of the 1979 Policy Interpretation, arguing that the Three-Part Test violates the Fifth Amendment's Equal Protection Clause. Id. at 901. The First Circuit ultimately rejected this argument, explaining as follows:

> What is more, even if we were to assume, for argument's sake, that the regulation creates a gender classification slanted somewhat in favor of women, we would find no constitutional infirmity. It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination. See, e.g., *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 3009, 111 L.Ed.2d 445 (1990) (noting that Congress need not make specific findings of discrimination to grant race-conscious relief); *Califano v. Webster,* 430 U.S. 313, 317, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) (upholding social security wage law that benefitted women in part because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women"). Despite the little legislative history regarding discrimination in collegiate athletics that emerged during the consideration of Title IX, Congress did hold "extensive hearings on higher education" when Title IX was pending, in the course of which "much testimony was heard with

> respect to discrimination against women in higher education." H.R.Rep. No. 554, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 2462, 2511. Athletics featured even more prominently in Congress's decision to reverse the *Grove City* rule. See supra pp. 8-9. Under these circumstances, we find Brown's plaint unbecoming.

Id. at 901.

The First Circuit revisited the same issues in *Cohen v. Brown University,* 101 F.3d 155 (1st Cir.1996) ("*Cohen II*"), after the district court determined, following a bench trial, that Brown's intercollegiate athletics program violated Title IX and its supporting regulations, and ordered Brown to maintain certain women's teams at the varsity level. In *Cohen II,* Brown again challenged, on constitutional and statutory grounds, the test employed by the district court in determining whether Brown's intercollegiate athletics program complied with Title IX. *Cohen II,* 101 F.3d at 162. To the extent that Brown challenged the test itself, the Court held that the challenge was foreclosed by the law of the case doctrine. Id. However, the Court determined that it could review the constitutionality of the district court's remedial order, and ultimately held that the order withstood intermediate scrutiny. Id. In reaching this decision, the Court went on to emphasize as follows:

> As explained previously, Title IX as it applies to athletics is distinct from other anti-discrimination regimes in that it is

impossible to determine compliance or to devise a remedy without counting and comparing opportunities with gender explicitly in mind. Even under the individual rights theory of equal protection, reaffirmed in *Adarand,* [515 U.S. at 227], 115 S.Ct. at 2112 (the equal protection guarantee "protects persons, not groups"), the only way to determine whether the rights of an individual athlete have been violated and what relief is necessary to remedy the violation is to engage in an explicitly gender-conscious comparison. Accordingly, even assuming that the three-part test creates a gender classification that favors women, allowing consideration of gender in determining the remedy for a Title IX violation serves the important objective of "ensuring that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not." *Kelley,* 35 F.3d at 272. In addition, a gender-conscious remedial scheme is constitutionally permissible if it directly protects the interests of the disproportionately burdened gender. See *Hogan,* 458 U.S. at 728, 102 S.Ct. at 3338 ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

Id. at 184-185.

In *Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265 (7th Cir.1994), the plaintiffs, members of the University of Illinois' men's swimming team, filed suit against the university's Board of Trustees, alleging that the defendants violated Title IX and the Equal Protection Clause of the Fourteenth Amendment, by voting to terminate the swimming team and three other varsity athletic programs. To the extent that the plaintiffs challenged the constitutionality of Title IX, the applicable regulations, and the 1979 Policy Interpretation, themselves, the Seventh Circuit rejected the plaintiffs' argument, explaining as follows:

> While the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution. Congress has broad powers under the Due Process Clause of the Fifth Amendment to remedy past discrimination. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 565-566, 110 S.Ct. 2997, 3008-10, 111 L.Ed.2d 445. Even absent a specific finding that discrimination has occurred, remedial measures mandated by Congress are "constitutionally permissible to the extent that they serve important governmental objectives ... and are substantially related to achievement of those ends." Id. at 565, 110

S.Ct. at 3009; see also *Mississippi University for Women v. Hogan,* 458 U.S. 718, 728, 102 S.Ct. 3331, 3338, 73 L.Ed.2d 1090. There is no doubt but that removing the legacy of sexual discrimination in the provision of extracurricular offerings such as athletics-from our nation's educational institutions is an important governmental interest. We do not understand plaintiffs to argue otherwise.

Plaintiffs' complaint appears, instead, to be that the remedial measures required by Title IX and the applicable regulation and policy interpretation are not substantially related to their purported goal. Plaintiffs contend that the applicable rules allow "the University to ... improve[ ] its statistics without adding any opportunities for women ..." (Br. 23), an outcome they suggest is unconstitutional. But to survive constitutional scrutiny, Title IX need not require-as plaintiffs would have us believe-that the opportunities for the underrepresented group be continually expanded. Title IX's stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex. And the remedial scheme established by Title IX and the applicable regulation and policy interpretation are clearly substantially related to this end. Allowing a school to

> consider gender when determining which athletic programs to terminate ensures that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not. And since the remedial scheme here at issue directly protects the interests of the disproportionately burdened gender, it passes constitutional muster. *Mississippi University for Women,* 458 U.S. at 728, 102 S.Ct. at 3338 ("[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."); see also *Cohen,* 991 F.2d at 900-901 (holding that Title IX and the applicable regulation and policy interpretation do not violate the Equal Protection Clause).

Kelley, 35 F.3d at 271-273.

In *Neal v. Bd. of Tr. of the Cal. State Univ.,* 198 F.3d 763 (9th Cir.1999), the Ninth Circuit, on appeal from the grant of a preliminary injunction, considered "whether Title IX prevents a university in which male students occupy a disproportionately high percentage of athletic roster spots from making gender-conscious decisions to reduce the proportion of roster spots assigned to men." Id. at 765. The Court held that Title IX" does not bar such remedial actions," Id., and that the 1979 Policy Interpretation does not raise serious constitutional questions, Id. at 772. In reaching this decision, the Court emphasized

that the First and Seventh Circuits had both considered the constitutionality of the first prong of the Three-Part Test, and that both Circuits had emphatically rejected the claim that the Policy Interpretation was unconstitutional under the Fourteenth Amendment. Id. at 772 (citing *Cohen I,* 991 F.2d at 899; *Cohen II,* 101 F.3d at 181-184; and *Kelley,* 35 F.3d at 272-273). The Court ultimately adopted the reasoning of *Cohen I, Cohen II,* and *Kelley,* and held that their constitutional analyses "disposed of any serious constitutional concerns that might be raised in relation to the OCR Policy Interpretation." Id.; see also *Boulahanis v. Board of Regents,* 198 F.3d 633, 639 (7th Cir.1999) ("[W]e repeat our holding in Kelley that 'while the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution.' ").

In light of the existing case law on the Three-Part Test, Equity goes to great lengths to persuade the court to reject the "prior extra-circuit decisions" (Equity Initial Brief at 17.) Equity also advances new arguments as to why the Three-Part Test is procedurally invalid. However, at this stage of the litigation, the court is unable to conclude that any of Equity's arguments have a strong likelihood of success.

Constitutionality of the Three-Part Test

In attempting to persuade the court to reject the First Circuit's decision in *Cohen I,* the Seventh

Circuit's decision in *Kelley*, and ultimately, the Ninth Circuit's decision in *Neal*, Equity emphasizes that both *Cohen I* and *Kelley* relied on the United States Supreme Court's decision in *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, 565-566, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), which was partially overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). However, as the First Circuit explained in *Cohen II*, the proposition for which *Cohen I* and *Kelley* cited *Metro Broadcasting* as authority-the general principle that Congress has broad powers to remedy past discrimination-was not "vitiated" or even reached by *Adarand*. *Cohen II*, 101 F.3d at 182. Instead, *Adarand* solely overruled *Metro Broadcasting* to the extent that *Metro Broadcasting* was inconsistent with the holding in *Adarand* that "all *racial* classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097 (emphasis added).[5]

---

[5] On this issue, *Metro Broadcasting* had held that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local

(Footnote cont'd on next page)

Consequently, in *Cohen II,* the First Circuit rejected Brown's reliance on *Adarand* as "contrary intervening controlling authority," emphasizing that "while Adarand does make new law, the law it makes is wholly irrelevant to the disposition of this appeal...." *Cohen II,* 101 F.3d at 181. See also *Neal,* 198 F.3d at 773, n. 8 ("The amicus brief filed by USA Wrestling and a number of other organizations repeatedly invokes the *Adarand* line of cases and Title VII precedents to suggest that the scope of remedial action to correct for disparities among groups is quite limited. Those precedents are not relevant in the context of collegiate athletics.").

Along similar lines, Equity argues that the Supreme Court's recent decision in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* ---U.S. ----, 127 S.Ct. 2738, 168 L.Ed.2d 508 (June 28, 2007), is controlling intervening authority that compels the conclusion that gender balancing, such as that provided by the first prong of the Three-Part Test, violates the Constitution's guarantee of equal protection. In *Parents Involved,* the Supreme Court addressed the issue of whether the Seattle,

---

(Footnote cont'd from previous page.)

governments. *Metro Broadcasting,* 497 U.S. at 565, 110 S.Ct. 2997.

Washington public school system, which had not operated legally segregated schools in the past, or the Jefferson County, Kentucky public school system, which had been found to be unitary, "may choose to classify students by race and rely upon that classification in making school assignments." *Parents Involved,* 127 S.Ct. at 2746. In a 5-4 decision, the Court held that the race-based assignment plans used by both school systems violated the Constitution's guarantee of equal protection, in that the plans were not narrowly tailored to further a compelling state interest. Id. at 2751-2754, 2759-2761. Chief Justice Roberts announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, and an opinion with respect to Parts III-B and IV, in which Justices Scalia, Thomas, and Alito joined.

In his majority opinion, Chief Justice Roberts emphasized that racial classifications are subject to strict scrutiny, and that, "[i]n order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans ... is 'narrowly tailored' to achieve a 'compelling' government interest." Id. at 2751-2752 (quoting *Adarand,* 515 U.S. at 227, 115 S.Ct. 2097). Although Chief Justice Roberts recognized that remedying the effects of past intentional discrimination is a compelling interest, he determined that such interest could not be relied upon by either school system, since the Seattle public school system had not operated legally segregated schools, and the

desegregation decree to which the Jefferson County schools were previously subject had been dissolved. Id. at 2752. Chief Justice Roberts also held that the school systems could not rely upon the compelling interest in diversity in higher education, upheld in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), since "[t]he diversity interest [in *Grutter*] was not focused on race alone but encompassed 'all factors that may contribute to student body diversity.' " Id. at 2753 (quoting *Grutter*, 539 U.S. at 337, 123 S.Ct. 2325).

In his plurality opinion, Chief Justice Roberts ultimately determined that the assignment plans utilized by the schools were "directed only to racial balance, pure and simple," Id. at 2755, which fails to qualify as a compelling state interest. In reaching this decision, Chief Justice Roberts emphasized as follows:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assure that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental

> decisionmaking such irrelevant factors as a human being's race' will never be achieved."

Id. at 2757-2758 (internal citations omitted). Having determined that the school systems' race-based assignment plans did not serve a compelling state interest, and that they were not narrowly tailored to "achieve their stated goals," Id. at 2760, Chief Justice Roberts ultimately held that the plans violated the Equal Protection Clause of the Fourteenth Amendment.

Relying on the foregoing passage from the plurality opinion, and Chief Justice Roberts' specific reference to citizens being treated as individuals, "not as simply components of a racial, religious, *sexual* or national class," Id. at 2757 (emphasis added), Equity argues that "gender balancing" is "clearly no longer appropriate." However, the court is unable to conclude that this single passage from the plurality opinion can be read to suggest such a sweeping application to circumstances beyond the racial classifications at issue in *Parents Involved*. Chief Justice Roberts' opinion simply does not discuss gender discrimination; its holding is limited specifically to racial classifications and the higher

degree of scrutiny to which they are subject;[6] and the court finds no compelling basis on which to assume that Chief Justice Roberts intended to include gender-based classifications within the scope of his opinion. See *Cohen II,* 101 F.3d at 183 (explaining why *Adarand,* and its discussion of racial classifications, does not extend to gender-based classifications). The court also notes that Chief Justice Roberts specifically rejected Justice Breyer's argument that "the plurality's views would threaten a surge of race-based litigation," since "[h]undreds of state and federal regulations use racial classifications for educational or other purposes." Id. at 2833. In response, Chief Justice Roberts emphasized that Justice Breyer's prediction was "unjustified," and that the examples of legislation

---

[6] Whereas racial classifications are subject to a strict scrutiny analysis, gender classifications are subject to a less demanding intermediate scrutiny analysis. See *Adkins v. Rumsfeld,* 464 F.3d 456, 468 (4th Cir.2006) ("A statute that explicitly classifies people based on sex is subject to intermediate scrutiny, which means 'it must be established at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.' ") (quoting *Nguyen v. INS,* 533 U.S. 53, 60, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001)).

cited by Justice Breyer "have nothing to do with the pertinent issues in these cases." Id. at 2766. Chief Justice Roberts' comments as to the limited scope of his opinion provide further support for the conclusion that it was not intended to provide immediate redress for cases outside the realm of race discrimination.

The court also notes that, as the DOE defendants emphasized during the hearing on the instant motion, gender classifications are simply different from racial classifications, especially in the realm of collegiate athletics. Unlike most educational settings, "athletic teams are gender segregated, and universities must decide beforehand how many athletic opportunities they will allocate to each sex." *Neal*, 198 F.3d at 773 n. 8. Consequently, "athletics require a gender conscious allocation of opportunities in the first instance," and "[t]he paradigm that has motivated the Supreme Court's more recent reverse-discrimination jurisprudence simply does not fit the case at bar." Id.

For these reasons, the court is unable to conclude that the Supreme Court's recent decision in *Parents Involved* fundamentally changes the equal protection analysis applicable to this case, or that it necessarily provides a basis upon which Equity may succeed on the merits of its equal protection arguments.

The Alleged Lack of Authority for the Three-Part Test

Equity next argues that the proportionality prong of the Three-Part Test establishes a disparate-impact standard, and that, pursuant to *Alexander v.*

Sandoval, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), the standard exceeds the scope of the DOE's authority under Title IX. However, as the DOE defendants explain in their response to Equity's motion, *Sandoval* provides no support for Equity's argument. In *Sandoval,* the Supreme Court solely addressed "the question [of] whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964." *Sandoval,* 532 U.S. at 278, 121 S.Ct. 1511. The Court specifically indicated that it was not inquiring as to whether the regulations were authorized by Title VI, Id. at 279, 121 S.Ct. 1511, and ultimately assumed for purposes of the case that the regulations at issue were valid, Id. at 281-282, 121 S.Ct. 1511. Consequently, the court is unable to conclude, on the basis of *Sandoval,* that Equity's argument regarding the alleged lack of authority for the Three-Part Test has a strong likelihood of success. See *National Wrestling Coaches Ass'n v. Dept. of Education,* 366 F.3d 930, 946 (D.C.Cir.2004) (distinguishing the same argument advanced by Equity from the argument at issue in *Sandoval*).

Deference Owed to the Three-Part Test

Equity next contends that the Three-Part Test is not entitled to deference, emphasizing that "[a]ll of the extra-circuit decisions" that uphold the Three-Part Test apply *Chevron*[7] deference to the 1979 Policy Interpretation, and that *Chevron* deference is no longer appropriate in light of the Supreme Court's decision in *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). However, the court is also unpersuaded by this argument. Even assuming that the Policy Interpretation is not entitled to deference under Chevron, it is still true that an agency's interpretation of its own regulation, as is the case here, "is entitled to deference and is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 293 (4th Cir.2007) (citing *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)). Having reviewed the parties' arguments and the relevant case law, the court is unable to conclude, at this stage of the litigation, that the Three-Part Test is not entitled to deference.[8] See *Chalenor*, 291 F.3d at

---

[7] *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[8] The court again notes, as it did during the hearing on Equity's motion, that the Three-Part Test, set forth in the 1979

(Footnote cont'd on next page)

1046 (holding that the Three-Part Test is entitled to controlling deference under *Auer*, even if *Chevron* deference is not due, since it constitutes a "reasonable and considered interpretation of the regulation"); *McCormick*, 370 F.3d at 290 ("Because the Policy Interpretation is both persuasive and not unreasonable, we need not, under *United States v. Mead Corp....*, decide here which form of deference to apply-*Skidmore* or *Chevron*.").

Procedural Challenges to the Three-Part Test

The court is also unable to conclude, at this stage of the litigation, that Equity is likely to succeed on its procedural challenges to the Three-Part Test. Equity first argues that the Three-Part Test is procedurally invalid because neither the 1979 Policy

---

(Footnote cont'd from previous page.)

Policy Interpretation, has been in existence for more than twenty-five years and has withstood a multitude of challenges. Courts have held that such longstanding and consistent administrative interpretations may be "entitled to considerable weight." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978); see also *Brown v. Gardner*, 513 U.S. 115, 121, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (noting that there are cases in which "consistent application and age can enhance the force of administrative interpretation").

Interpretation nor the DOE's subsequent Clarifications complied with the Administrative Procedure Act's ("APA") notice and comment procedures. See 5 U.S.C. § 553. However, as the United States Court of Appeals for the District of Columbia Circuit noted in *National Wrestling,* the challenged policies "are interpretive guidelines that the Department was not obligated to issue in the first place," *National Wrestling,* 366 F.3d at 940, and interpretive guidelines are not subject to the APA's notice and comment procedures. See *Chen Zhou Chai v. Carroll,* 48 F.3d 1331, 1340 (4th Cir.1995) ("The notice and comment requirement of the APA does not apply to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, practice.'") (quoting 5 U.S.C. § 553(b)). Although Equity argues that the 1979 Policy Interpretation and its subsequent clarifications essentially amended the regulations that they interpret, courts have held that an interpretive guideline does not "become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted." *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C.Cir.1993). "If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." Id.

The court is also presently unpersuaded by Equity's argument that the Three-Part Test is not in effect, because the 1979 Policy Interpretation was not signed by the President in the Federal Register.

While 20 U.S.C. § 1682 provides that any "rule, regulation, or order" issued by a federal agency to effectuate the anti-discrimination provisions of Title IX shall become effective only if approved by the President, the statute does not require Presidential approval each and every time an agency issues interpretive guidelines. Equity's argument to the contrary has been expressly rejected by other courts.[9] See *Cohen v. Brown Univ.*, 879 F.Supp. 185, 199 (D.R.I.1995), rev'd in part on other grounds, 101 F.3d 155 (1st Cir.1996) (holding that the 1979 Policy

---

[9] The court notes that, in its post-hearing brief, Equity argues that "there nearly was [Fourth Circuit authority]" to support its presidential approval argument, relying on Judge Widener's opinion concurring in part and dissenting in part in *Mayor and City Council of Baltimore v. Mathews*, 562 F.2d 914 (4th Cir.1977), vacated, 571 F.2d 1273 (4th Cir.1978). However, the statement from Judge Widener's opinion on which Equity relies provides no support for Equity's particular argument. That statement-"the more basic problem for me lies in the lack of formally adopted, nationally uniform, standards approved by the President"-refers to the Department of Health, Education, and Welfare's failure to adopt any Title VI regulations with respect to state systems of higher education. Id. at 927. Neither Judge Widener's opinion, nor any other portion of the vacated Mathews decision, addresses whether regulations' interpretive guidelines must be approved by the President under 20 U.S.C. § 1682.

Interpretation "need not be approved by the President in order to become effective," since the Policy Interpretation "is not a rule, regulation, or order, but is a guideline designed to interpret a rule, regulation, or order, namely the agency's own regulations...."); *Cmtys. for Equity v. Mich. High School, Athletic Ass'n*, 2001 U.S. Dist. LEXIS 5834, at *6 (W.D.Mich. May 2, 2001) ("[T]he Court finds no reason why the Policy Interpretation must be signed by the President as it is only a guideline to interpret Title IX, and not a rule, regulation, or order.").

Equal Protection Claim Against JMU

Equity next argues that JMU's gender-conscious decision to eliminate certain athletic programs denied student-athletes equal protection in violation of the Fourteenth Amendment. This same argument was rejected by the Seventh Circuit in *Kelley:*

> Plaintiffs' final argument is that the defendants' decision to eliminate the men's swimming program while retaining the women's program denied them equal protection of law as guaranteed by the Fourteenth Amendment. We do not agree. First the record makes clear that the University considered gender solely to ensure that its actions did not violate federal law. And insofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible. *Milwaukee County Pavers*

Ass'n v. Fiedler, 922 F.2d 419, 424 (7th Cir.1991), certiorari denied, 500 U.S. 954, 111 S.Ct. 2261, 114 L.Ed.2d 714.

Kelley, 35 F.3d 265, 272 (7th Cir.1994). Likewise, relying on *Kelley,* the Eighth Circuit rejected the same argument in *Miami Univ. Wrestling Club:*

> In the case before us today, it is evident that Miami took the challenged actions in an attempt to comply with the requirements of Title IX, and as we explain below, Miami was successful in that attempt. Only if Title IX, its regulations or the Policy Interpretation are unconstitutional ... could we hold that Miami's compliance with the law and the regulations is unconstitutional.

Miami Univ. Wrestling Club, 302 F.3d at 614.

In this case, it is undisputed that JMU chose to eliminate certain men's athletic programs in an attempt to comply with the requirements of Title IX. Based on the Seventh Circuit's reasoning in *Kelley* and the Eighth Circuit's reasoning in *Miami Univ. Wrestling Club,* the court is unable to conclude that Equity's equal protection challenge to JMU's decision has a strong likelihood of success.

New First Amendment Claim Against JMU

In its post-hearing brief, Equity argues that the planned cuts will injure its members' "associational rights" under the First Amendment, and that "the University Defendants must meet strict scrutiny before they restrict the Swimming, Track, and Cross Country teams' rights to associate...." (Post-Hearing

Br. at 2.) This is an entirely new claim, which is not asserted in Equity's amended complaint.[10] The court

---

[10] The court notes that Equity does assert, in its amended complaint, that the JMU defendants violated the student-athletes' right to due process of law, as guaranteed by the Fourteenth Amendment. However, Equity does not address the merits of its due process claim in any of the briefs submitted in support of its motion for preliminary injunction. Based on the court's own review of relevant case law, the court is unpersuaded that such claim has a strong likelihood of success. See *Mitchell v. La. High Sch. Athletic Ass'n*, 430 F.2d 1155, 1157-1158 (5th Cir.1970) (holding that "[t]he privilege of participating in interscholastic athletics must be deemed to fall ... outside the protection of due process"); *Hamilton v. Tenn. Secondary Sch. Athletic Ass'n*, 552 F.2d 681, 682 (6th Cir.1976) (rejecting the argument that the privilege of participating in interscholastic athletics is protected by the Fourteenth Amendment's guarantee of due process); *Seamons v. Snow*, 84 F.3d 1226, 1235 (10th Cir.1996) (holding that a student had "no constitutionally protected property interest in participating in the school's athletic program"); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 344 (3d Cir.2004) (holding that the plaintiff's due process claim could be "summarily dismissed," since the plaintiffs conceded that they had "no property interest ... in participating in extracurricular activities, including sports ...") (internal quotations omitted); *Brands v. Sheldon Comm. Sch.*, 671 F.Supp. 627, 631 (N.D.Iowa 1987) ("A clear majority of courts addressing this question in the context of interscholastic or intercollegiate athletics has found that athletes have no legitimate entitlement to participate."); *Graham v. Tenn. Secondary Sch. Athletic Ass'n*, 1995 WL

(Footnote cont'd on next page)

agrees with the DOE defendants that new legal theories must be added by way of amended pleadings, not by arguments asserted in legal briefs. See *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir.2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."); *Anderson v. Aset Corp.*, 329 F.Supp.2d 380, 383 (W.D.N.Y.2004) ("a memorandum of law is not a proper vehicle for rewriting or amending the complaint"); *Church v. Maryland*, 180 F.Supp.2d 708, 737 (D.Md.2002) (disregarding an allegation that was raised for the first time in plaintiff's affidavit in opposition to defendants' motion for summary judgment).

Notwithstanding the court's view that Equity's claims must be clearly expressed in its complaint, the court is unable to conclude that this new claim is likely to succeed on the merits.[11] "[A] constitutionally

---

(Footnote cont'd from previous page.)

115890, at *6, 1995 U.S. Dist. LEXIS 3211, at *18 (E.D.Tenn. Feb. 20, 1995) ("Moreover, participation in interscholastic athletic competition is a mere privilege, not a property right, and it falls outside the protection of due process.").

[11] The court notes that Equity cites no case law to support its proposition that members of intercollegiate teams have a right of association protected by the First Amendment.

protected right to associate depends upon the existence of an activity that is itself protected by the First Amendment," *Willis v. Town of Marshall,* 426 F.3d 251 (4th Cir.2005), and courts "have generally been unwilling to extend First Amendment protection to sports or athletics," *Maloney v. Cuomo,* 470 F.Supp.2d 205, 213 (E.D.N.Y.). See *Justice v. Nat'l Collegiate Athletic Ass'n,* 577 F.Supp. 356, 374 (D.Ariz.1983) ("[P]laintiff's argument that the players have been denied a constitutional right to expression through football is unfounded."); *MacDonald v. Newsome,* 437 F.Supp. 796, 798 (E.D.N.C.1977) (holding that surfing is not protected by the First Amendment); *Murdock v. City of Jacksonville,* 361 F.Supp. 1083, 1095-1096 (M.D.Fla.1973) (holding that wrestling is not protected by the First Amendment); see also *Graham v. Tenn. Secondary Sch. Athletic Ass'n,* 1995 WL 115890, at *7, 1995 U.S. Dist. LEXIS 3211, at *20 (E.D.Tenn. Feb. 20, 1995) (holding that "[p]articipation by students in school athletic activities is recreational in nature and qualifies neither as a form of 'intimate association' nor as a form of 'expressive association' entitled to constitutional protection").

Claims Under State Law

In addition to its claims under federal law, Equity alleges that the JMU defendants violated the Virginia Human Rights Act and the Constitution of Virginia. In response to the argument that such claims are barred by the Eleventh Amendment, see *Pennhurst State Sch. & Hosp. v. Halderman,* 465

U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), Equity argues that its motion for preliminary injunction seeks to enforce, not simply state law, but "federalized state law" under 42 U.S.C. § 1988(a).[12] However, contrary to Equity's assertion, § 1988(a) does not create any new causes of action; it merely provides the applicable law in actions that are already proper under civil rights statutes, such as 42 U.S.C. § 1983. See *Moor v. County of Alameda,* 411

---

[12] Section 1988(a) provides as follows:

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

U.S. 693, 701, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) ("Section 1988 does not authorize federal courts 'to borrow entire causes of action from state law' "); *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474 (4th Cir.1978) ("Section 1988 in itself does not create any cause of action, but it 'instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts' ") (internal citations omitted). Consequently, the court is unpersuaded that Equity's "federalized state claims" have a strong likelihood of success.[13]

In sum, the court is unable to conclude, at this stage of the litigation, that any of the aforementioned claims are likely to succeed on the merits. Accordingly, this factor weighs heavily against Equity.

---

[13] The court notes that Equity cites *Antrican v. Odom*, 290 F.3d 178 (4th Cir.2002), to support the proposition that its state law claims are "federalized claims" under § 1988(a). However, the portion of the Antrican decision on which Equity relies does not discuss § 1988(a) or otherwise support Equity's argument. See Antrican, 290 F.3d at 187-88 (holding that North Carolina officials could not rely on the principles of sovereign immunity set forth in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), since the plaintiffs were seeking to enforce federal standards associated with the Medicaid Act, as opposed to a state's own laws).

3. Public Interest

The court is not unsympathetic to the plight of the members of the athletic programs that were chosen for elimination by JMU's Board of Visitors. These students are innocent victims of Title IX's benevolent attempt to remedy the effects of past discrimination against women, and JMU's efforts to comply with Title IX. Nonetheless, the court finds that the final factor, the public interest, "weighs in favor of permitting colleges and universities to chart their own course in providing athletic opportunities without judicial interference or oversight, absent a clear showing that they are in violation of the law." *Gonyo,* 837 F.Supp. at 996.

Conclusion

For the reasons stated, the court concludes that none of the factors set forth in the *Blackwelder* test favor granting a preliminary injunction. Accordingly, Equity's motion for preliminary injunction must be denied.

The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to all counsel of record.

ENTER: This 21st day of August, 2007.

/s/ Glen E. Conrad
United States District Judge

United States District Court for the
Western District of Virginia
Harrisonburg Division

Equity in Athletics, Inc.,

Plaintiff,

v.

Department of Education, *et al.*,

Defendants.

No. 5:07-0028-GEC
Filed Aug. 21, 2007

ORDER

By: Hon. Glen E. Conrad
United States District Judge

For the reasons stated in the accompanying memorandum opinion, it is now

ORDERED

that Equity's motion for preliminary injunction shall be and hereby is **DENIED.**

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 21st day of August, 2007.

/s/ Glen E. Conrad
United States District Judge

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C. § 551(4)-(6) Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription

for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

5 U.S.C. § 553(b)-(d), Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

20 U.S.C. §1231 (1979)[1]

(a)(1) For the purpose of this section, the term "regulation" means any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability...

(b)(l) No proposed regulation prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.

...

(d)(l) Concurrently with the publication in the Federal Register of any final regulation as required in subsection (b) of this section, such final regulation shall be transmitted to the Speaker of the House of Representatives and the President of the Senate. Such final regulation shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation.

...

---

[1] The General Counsel of the Department of Health, Education & Welfare memorialized the 1979 version of 20 U.S.C. §1231 as an attachment to an opinion dated April 3, 1979, to the Secretary of the Department, as documented in First Am. Compl. Ex. 9 (reprinted in Court of Appeals Joint Appendix, at 117-18).

(f) For the purposes of subsections (d) and (e) of this section, activities under section 404, 405, and 406 of this title, and under Title IX of the Education Amendments of 1972 shall be deemed to be applicable programs.

20 U.S.C. § 1681 (a)-(b), Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, . . .

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in,

or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1682, Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. . . .

20 U.S.C. § 1683, Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State

or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

42 U.S.C. §1983, Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988(a), Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of

titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

PUB. L. NO. 93-380, §844, 88 STAT. 484, 612 (1974)

The Secretary [of Health, Education and Welfare] shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

VA. CODE ANN. §2.2-3901

Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability shall be an "unlawful discriminatory practice" for the purposes of this chapter.

...

45 C.F.R. §86.41(a)-(c)(1), Athletics [*cf.* 34 C.F.R. § 106.41(a)-(c)(1) (same)]

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; . . .

Federal Register, Vol. 44, No. 239, Tuesday, December 11, 1979, Rules and Regulations (44 Fed. Reg. 71,413)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits

EFFECTIVE DATE: December 11, 1979

. . .

SUPPLEMENTARY INFORMATION:

1. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of [of HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are

used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.[]

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

- Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.
- Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal

in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and

- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain

obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of

stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditure patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

. . .

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 88.37(c) and 88.41(c).

. . .

C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available.

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy - Determination of Athletic Interests and Abilities.

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy - Selection of Sports.

In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team

and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. Application of the Policy - Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be

required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. Overall Determination of Compliance.

The Department will base its compliance determination under ' 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

. . .

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

. . .

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
<seal> THE ASSISTANT SECRETARY
Jan 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with

Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test--substantial proportionality--focuses on the participation rates of

men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly

establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three

parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then--because, for example, part three of the three-part test permits evidence that

underrepresentation is caused not by discrimination but by lack of interest--is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so--and comply with Title IX--notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely, <signed>
Norma V. Cantú, Assistant Secretary for Civil Rights

Jan 16, 1996

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 Fed. Reg. 71413 et seq. (1979)).[1]

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal

---

[1] The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.

athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each

sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 Fed. Reg. 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities

provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST – Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

Who are listed on the eligibility or squad lists maintained for each sport, or

Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 Fed. Reg. at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test. Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations

reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality--for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality--the Policy Interpretation examines whether participation

opportunities are "substantially" proportionate to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50 percent of the participants in its athletic program are female--its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST – Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.[2]

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing

---

[2] Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

interests and abilities. Developing interests include interests that already exist at the institution.[3] There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

---

[3] However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate

the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in

compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST – Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex -- including students who are admitted to the institution though not yet enrolled. Title IX provides that at recipient must provide equal athletic opportunity to its students.

Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.[4]

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition

---

[4] However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.

for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and

- participation in particular in interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).[5] For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the

---

[5] While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

the athletic experience and accomplishments--in interscholastic, club or intramural competition--of students and admitted students interested in playing the sport;
opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.
Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.
c) Is there a reasonable expectation of competition for the team?
Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:
competitive opportunities offered by other schools against which the institution competes; and
competitive opportunities offered by other schools in the institution's geographic area, including those

offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

<seal>

'THE ASSISTANT SECRETARY
July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletic opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department' s Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February

26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.

Title IX establishes that: "No person in the United States shall, on the basis of sex, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate-level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full- time undergraduate enrollments, 2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. If a school does not satisfy the "substantial proportionality" prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if "the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs - substantial proportionality - as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing

nondiscriminatory participation opportunities to their students, and OCR does not require quotas."

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, OCR encourages schools to request individualized assistance from OCR as they consider ways to meet the requirements of Title IX. As OCR works with schools on Title IX compliance, OCR will share information on successful approaches with the broader scholastic community.

Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams

diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.

Therefore, in negotiating compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams.

Third, OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. At the same time, OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, OCR will ensure that its enforcement practices do not vary from region to region.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a challenge for many academic institutions. But OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes.

OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students.

Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds

Assistant Secretary for Civil Rights

ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST — PART THREE

BACKGROUND

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., an anti-discrimination statute, which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds.[1] The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs. In part, the regulation requires schools to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). In determining whether equal opportunities are available, the regulation provides that OCR will consider, among other factors, whether the selection of sports and levels of

---

[1] OCR does not enforce the Fourteenth Amendment to the U.S. Constitution. Furthermore, because the scope of the Equal Protection Clause of the Fourteenth Amendment may differ from the scope of the Title IX statute, this Additional Clarification does not regulate or implement constitutional requirements or constitute advice about the Constitution.

competition effectively accommodate the interests and abilities of students of both sexes.

To provide further clarification of the Title IX regulatory requirements, the Department published the Intercollegiate Athletics Policy Interpretation (Policy Interpretation) in the Federal Register on December 11, 1979 (44 Fed. Reg. 71,413 (1979)).[2] The Policy Interpretation provides that, as part of determining whether an institution is effectively accommodating the interests and abilities of male and female athletes, institutions must provide the opportunity both for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules that equally reflect their abilities.[3] The Policy Interpretation permits three alternate ways of assessing whether institutions are providing nondiscriminatory opportunities to participate in intercollegiate athletics. In essence, each part of the three-part test is a safe harbor, and no part is favored by OCR. The three-part test is intended to allow institutions to maintain flexibility and control

---

[2] The regulation implementing Title IX and the Policy Interpretation were originally published by the former Department of Health, Education, and Welfare, and were later adopted by the Department of Education, established in 1980.

[3] This document does not address competitive team schedules that equally reflect student abilities.

over their athletic programs. OCR does not preapprove or review compliance with these standards by every institution. OCR investigates complaints of discrimination and may, at its discretion, conduct compliance reviews.[4]

The Policy Interpretation specifically delineates the following three-part test and stipulates that compliance will be assessed in any one of the following ways:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as provided above, whether it can be demonstrated that

---

[4] There is a private right of action under Title IX, so that individuals may take legal action directly against the colleges or universities.

the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418.

...

Supreme Court, U.S.
FILED
FEB 4 - 2009
OFFICE OF THE CLERK

No. 08-672

In the Supreme Court of the United States

EQUITY IN ATHLETICS, INC., PETITIONER

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
BARBARA C. BIDDLE
THOMAS M. BONDY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in declining to preliminarily enjoin James Madison University from eliminating certain men's and women's athletic teams.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Blackwelder Furniture Co. of Statesville, Inc. v. *Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977) 10

Boulahanis v. *Board of Regents*, 198 F.3d 633 (7th Cir. 1999), cert. denied, 530 U.S. 1284 (2000) 13

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 15

Chalenor v. *University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002) 12, 13

Charlesbank Equity Fund II v. *Blinds to Go, Inc.*, 370 F.3d 151 (1st Cir. 2004) 11

Citibank, N.A. v. *Citytrust*, 756 F.2d 273 (2d Cir. 1985) 11

Cohen v. *Brown Univ.*:
991 F.2d 888 (1st Cir. 1993). 12, 14
101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) 12

College Sports Council v. *Department of Educ.*, 465 F.3d 20 (D.C. Cir. 2006), cert. denied, 128 S. Ct. 129 (2007) 14

Cases—Continued: Page

Direx Israel, Ltd. v. *Breakthrough Med. Corp.*, 952 F.2d 802 (4th Cir. 1991) 6

Fitzgerald v. *Barnstable Sch. Comm.*, No. 07-1125, 2009 WL 128173 (Jan. 21, 2009) 9

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 16

Horner v. *Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994) 14

Kelley v. *Board of Trs.*, 35 F.3d 265 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995) 8, 9, 12, 13

Miami Univ. Wrestling Club v. *Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) 12

MicroStrategy Inc. v. *Motorola, Inc.*, 245 F.3d 335 (4th Cir. 2001) 7

National Wrestling Coaches Ass'n v. *Department of Educ.*, 366 F.3d 930 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005) 14

Neal v. *Board of Trs. of Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999) 6, 12

North Haven Bd. of Educ. v. *Bell*, 456 U.S. 512 (1982) 2, 13

Parents Involved in Cmty. Schs. v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) 13

Pederson v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000) 12

Roberts v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993) 12

Ty, Inc. v. *Jones Group, Inc.*, 237 F.3d 891 (7th Cir. 2001) 11

Cases—Continued: Page

VMI v. *United States*, 508 U.S. 946 (1993) 15
Williams v. *School Dist.*, 998 F.2d 168 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994) 12
Winter v. *NRDC*, 129 S. Ct. 365 (2008) 10
Young, Ex parte, 209 U.S. 123 (1908) 7

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 5
Department of Education Organization Act, Pub. L. No. 96-88, § 101, 93 Stat. 669 (20 U.S.C. 3401 *et seq.*) 2
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* ..... *passim*
20 U.S.C. 1681(a) 2
20 U.S.C. 1682 14
20 U.S.C. 3441(a)(3) 2
20 U.S.C. 3505(a) 2
42 U.S.C. 1983 ..... 7, 8
34 C.F.R.:
Pt. 106 2
Section 106.41 14
Section 106.41(c) 2
45 C.F.R.:
Section 86.41 14
Section 86.41(c) 2

Miscellaneous:

40 Fed. Reg. 24,128 (1975) 2
44 Fed. Reg. 71,418 (1979) 3

Miscellaneous—Continued: Page

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 15

In the Supreme Court of the United States

No. 08-672

EQUITY IN ATHLETICS, INC., PETITIONER

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the *Federal Reporter* but is reprinted in 291 Fed. Appx. 517. The opinion of the district court (Pet. App. 16a-74a) is reported at 504 F. Supp. 2d 88.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2008. The petition for a writ of certiorari was filed on November 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972 provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from partic-

ipation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). In 1975, following notice and comment, the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX, which were approved by President Ford. 40 Fed. Reg. 24,128 (1975). HEW's regulations, which remain in effect through the Department of Education (DOE),[1] address the issue of sex discrimination in athletics, providing that "[a] recipient [institution] * * * shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the [agency] will consider, among other factors * * * [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. 106.41(c); see 45 C.F.R. 86.41(c); see also 20 U.S.C. 3505(a).

In 1979, also following notice and comment, HEW issued a Policy Interpretation to provide further guidance and address a large number of complaints alleging sex discrimination in athletics. That Policy Interpretation establishes a three-part test (Three-Part Test), whereby an education institution is in compliance with Title IX if it meets one of three criteria:

---

[1] In 1979, HEW's functions under Title IX were transferred to DOE, *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 516 n.4 (1982) (citing 20 U.S.C. 3441(a)(3) (Supp. IV 1980)), when Congress divided HEW into two separate agencies, the Department of Health and Human Services and DOE. See Department of Education Organization Act, Pub. L. No. 96-88, § 101, 93 Stat. 669 (20 U.S.C. 3401 *et seq.*). DOE recodified without substantive change HEW's regulations implementing Title IX. See 34 C.F.R. Pt. 106.

i. "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or"

ii. "[w]here the members of one sex have been and are underrepresented among intercollegiate athletes, * * * the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or"

iii. "[w]here the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, * * * it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."

Pet. App. 95a-96a; 44 Fed. Reg. 71,418 (1979).

In 1996, DOE issued additional clarification regarding the 1979 Policy Interpretation and its Three-Part Test, emphasizing three points. First, DOE "confirm[ed] that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes." Pet. App. 101a. Second, DOE recognized that its three-part test "does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best

to comply with the law." *Id.* at 102a. Third, addressing apparent "confusion about the elimination and capping of men's teams in the context of Title IX compliance," *id.* at 106a, DOE explained that "[t]he rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing * * * requires that an institution cap or eliminate participation opportunities for men." *Ibid.* DOE issued further clarifications elaborating upon these points in 2003 and 2005. See *id.* at 129a, 135a.

2. a. Petitioner filed this action in March 2007, naming as defendants the United States, DOE, the Secretary of Education, and the Assistant Secretary of Education for Civil Rights. In an amended complaint filed in June 2007, petitioner added as defendants James Madison University (JMU) and various JMU officials, including its President, Athletic Director, and members of the Board of Visitors. The amended complaint alleged that DOE's Three-Part Test was substantively and procedurally flawed, and on that basis sought injunctive and declaratory relief against the federal defendants. The amended complaint also alleged that JMU had announced in September 2006 a plan to eliminate a number of its intercollegiate athletic teams on July 1, 2007.[2] The amended complaint sought injunctive and declaratory relief against the state defendants to halt those planned cuts. C.A. App. 11-65 (amended complaint).

b. On June 15, 2007, petitioner filed a motion for a preliminary injunction. The motion, which requested relief against only the state defendants, sought to enjoin

[2] The teams in question were men's swimming, track, cross-country and wrestling; men's and women's archery and gymnastics; and women's fencing. See Pet. App. 4a.

JMU's planned elimination of specified athletic teams. The motion argued that the planned cuts were based at least in part on DOE's Three-Part Test, and that the Three-Part Test was legally invalid under the Constitution; Title IX, including its implementing regulations; the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*; and various provisions of state law. See Pet. App. 5a-6a.

On August 21, 2007, the district court denied the preliminary injunction. Pet. App. 16a-74a. The court first noted that "any delay attributable to the plaintiff in initiating a preliminary injunction may be considered when balancing the harm to the plaintiff against the harm to the defendants." *Id.* at 42a. Here, "[m]ore than five months elapsed between the date of the Board of Visitors' decision and the date on which this action was filed, and nearly three months elapsed between the filing of the original complaint and the filing of the motion for preliminary injunction." *Ibid.* The court further observed that, "[d]uring this period of delay, the university took a number of actions that it normally would not have taken, and did not take a number of actions that it normally would have taken, based on the fact that certain athletic programs would no longer exist on July 1, 2007." *Id.* at 43a. For example, "[s]everal coaches have been terminated, competitions have been cancelled, and funds totaling nearly $350,000 from the eliminated programs have been reallocated to other programs for coaching salaries and scholarships." *Ibid.* "Additionally, no further competitions have been scheduled for the eliminated athletic programs, no athlete recruitment has taken place for the eliminated programs, and no efforts

have been made to establish the eligibility of the eliminated programs or their athletes."[3] *Ibid.*

In light of petitioner's delay in filing suit and seeking interim relief, and the actions taken by JMU, the court explained that "a strong showing of likelihood of success" on the merits was required to justify a preliminary injunction. Pet. App. 44a (quoting *Direx Israel, Ltd.* v. *Breakthrough Med. Corp.*, 952 F.2d 802, 818 (4th Cir. 1991)). The court determined that petitioner had demonstrated no such likelihood. The court emphasized that, "[i]n addressing [petitioner's] likelihood of success on the merits, the court must * * * recognize that a number of Circuits have addressed many of the same issues raised by [petitioner]," including "whether the Three-Part Test set forth in the 1979 Policy Interpretation violates Title IX or the applicable regulations * * * and whether the proportionality prong of the Three-Part Test offends constitutional principles of equal protection." *Ibid.* The court recognized that "[e]very court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case)." *Id.* at 44a-45a (quoting *Neal* v. *Board of Trs. of the Cal. State Univs.*, 198 F.3d 763, 769-770 (9th Cir. 1999)). "Likewise," the court continued, "every Circuit [to consider] the constitutionality of the proportionality prong of the Three-Part Test has held that it does not offend constitutional principles of equal protection." *Id.* at 46a. "In light of the existing

---

[3] The athletic programs at issue have at this point been abolished, and are no longer in existence.

case law," the court was "unable to conclude that any of [petitioner's] arguments [has] a strong likelihood of success." *Id.* at 53a.

3. The court of appeals affirmed in a unanimous, unpublished decision. Applying the traditional factors for considering whether to grant preliminary injunctive relief, the court determined that, "[u]pon review, the balance of the harms here is not so one-sided that we can say that the district court either abused its discretion or clearly erred in its identification and assessment of the harms." Pet. App. 8a-9a. The court noted that, "[a]bsent an 'imbalance of hardship in favor of the plaintiff, then the probability of success begins to assume real significance, and interim relief . . . require[s] a clear showing of a likelihood of success.'" *Id.* at 9a (quoting *MicroStrategy Inc.* v. *Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001)). The court then observed that "nearly every circuit in the country has rejected challenges similar to [petitioner's] underlying complaint against JMU, i.e., that JMU violated Title IX and the Constitution when it used gender to determine which athletic programs to cut." *Id.* at 13a. Against this backdrop, the court concluded that petitioner had "failed to establish a likelihood of success on its claims," and thus had "failed to establish that the district court abused its discretion * * * in rejecting [the] motion for a preliminary injunction." *Id.* at 13a-14a.

ARGUMENT

Petitioner claims that this Court should grant certiorari to determine (1) whether Title IX precludes suit against school officials under 42 U.S.C. 1983 and *Ex parte Young*, 209 U.S. 123 (1908) (Pet. 12-18); (2) whether the court of appeals applies the proper stan-

dard to a request for a preliminary injunction (Pet. 23-24); and (3) whether the government's approach to intercollegiate athletics under Title IX is substantively and procedurally flawed (Pet. 18-23, 24-38). With respect to each of those claims, the unpublished decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 12-13) that the court of appeals held that Title IX "preempts" suit against school officials under 42 U.S.C. 1983 and *Ex parte Young*. Pet. 13; see Pet. 17-18 ("Title IX cannot preempt § 1983," and "[e]ven if Title IX preempts § 1983, it does not preempt [petitioner's] challenge to the lawfulness of JMU's and DOE's actions."). That is not true. The court of appeals found that petitioner's claims were likely to fail on the merits. Pet. App. 13a-14a. It did not find that Title IX precludes the use of Section 1983 to bring suit against school officers.

Petitioner's mistaken view hinges on its assertion that "the Fourth Circuit cited *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994), for the proposition that '[i]nsofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible.'" Pet. 12 (quoting Pet. App. 13a). In context, that statement has nothing to do with implied preclusion, either in *Kelley* v. *Board of Trs.*, 35 F.3d 265 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995), or in the present case.

In *Kelley*, plaintiffs challenged the University of Illinois's elimination of certain men's athletic teams. 35 F.3d at 267. The Seventh Circuit held that Title IX

is consistent with the Constitution, *id.* at 272, and that the implementing regulation and 1979 Policy Interpretation are consistent with Title IX, *ibid.* That made disposing of the case straightforward. It was "clear that the University considered gender solely to ensure that its actions" were in compliance with Title IX, and thus "plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible." *Ibid.* In other words, plaintiffs' suit was "impermissible" not because it was impliedly precluded by Title IX, but because the university could not be held liable for doing what Title IX validly permits.

The court of appeals applied the same logic here. It cited *Kelley* the first time for the proposition that courts have "rejected Equal Protection claims similar to [petitioner's] constitutional claims against JMU." Pet. App. 11a. Indeed, the court quoted *Kelley*'s language that "[t]o the extent that [petitioner's] argument is that Title IX and the applicable regulation . . . are unconstitutional, it is without merit." *Id.* at 12a (quoting *Kelley*, 35 F.3d at 272). Only later did the court cite *Kelley* again, this time for the proposition that JMU could not be held liable for complying with a valid statutory and regulatory scheme. Neither in its citations of *Kelley* nor elsewhere did the court ever suggest that petitioner's action was impliedly precluded. To the contrary, the court repeatedly said instead that petitioner's action lacked merit. *Id.* at 11a-13a. And because the court of appeals did not address the preclusion question, this Court's recent decision in *Fitzgerald* v. *Barnstable School Committee*, No. 07-1125 (Jan. 21, 2009), is not relevant.

2. Petitioner further contends (Pet. 23-24) that the court of appeals applied the wrong standard to its request for a preliminary injunction. Again, that is not

true. In concluding that the district court's denial of interim relief reflected no abuse of discretion, the court of appeals considered the factors that have traditionally governed the preliminary injunction inquiry: "(1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if it is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." Pet. App. 6a.

Petitioner suggests (Pet. 23) that this Court's recent decision in *Winter* v. *NRDC*, 129 S. Ct. 365 (2008), applied a different test from the court of appeals. This Court reiterated in *Winter*, however, that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. Nothing in the holding of the court of appeals in this case is inconsistent with that well-settled formulation.

Even assuming that, under *Blackwelder Furniture Co. of Statesville, Inc.* v. *Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), the court of appeals "provides interim relief too easily," Pet. 23, and "is too lenient," Pet. 37, petitioner can hardly be heard to complain: it could not satisfy that allegedly laxer standard. Petitioner thus does an about-face and claims that it faced the "opposite problem," Pet. 23, because the court of appeals improperly considered petitioner's delay in requesting injunctive relief.[4] Petitioner does not point to any decision of

[4] The court of appeals did not find that petitioner was barred from requesting or obtaining a preliminary injunction by any "equitable defenses" like laches. Pet. 24. The court found only that petitioner's delay

this Court or of any court of appeals holding that such delay should not be considered.

To the contrary, several courts of appeals have reached the common-sense conclusion that a plaintiff's "[d]elay in seeking enforcement of [his] rights * * * tends to indicate at least a reduced need for such drastic, speedy action" as a preliminary injunction. *Citibank, N.A.* v. *Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); see, *e.g.*, *Charlesbank Equity Fund II* v. *Blinds To Go, Inc.*, 370 F.3d 151, 163 (1st Cir. 2004) ("[D]elay between the institution of an action and the filing of a motion for preliminary injunction, not attributable to intervening events, detracts from the movant's claim of irreparable harm."); *Ty, Inc.* v. *Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered.").

3. Petitioner further contends that the government's approach to intercollegiate athletics under Title IX is substantively and procedurally flawed (Pet. 18-23, 24-38). The district court did not abuse its discretion in deciding that petitioner was likely incorrect on both scores. Even assuming petitioner's claims had some likelihood of success on the merits (which they do not), the district court did not abuse its discretion in finding that the public interest weighed against a preliminary injunction. Moreover, there is no need to review the court of appeals' interlocutory decision at this time.

---

in requesting such an injunction was itself a factor relevant to whether petitioner had suffered irreparable harm. Pet. App. 42a-43a.

a. The crux of petitioner's argument is that JMU decided to reduce its roster of intercollegiate athletic teams in reliance on DOE's Three-Part Test—a test that, in petitioner's view, is legally invalid. As petitioner concedes (Pet. 12), however, the courts of appeals that have addressed the issue have unanimously rejected similar attacks on the Three-Part Test. See *Miami Univ. Wrestling Club* v. *Miami Univ.*, 302 F.3d 608 (6th Cir. 2002); *Chalenor* v. *University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Neal* v. *Board of Trs. of the Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999); *Cohen* v. *Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (*Cohen II*), cert. denied, 520 U.S. 1186 (1997); *Kelley* v. *Board of Trs.*, *supra*; *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); *Williams* v. *School Dist.*, 998 F.2d 168 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994); *Cohen* v. *Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (*Cohen I*).

As these courts have explained, "Title IX does not require that a school pour ever-increasing sums into its athletic establishment." *Cohen I*, 991 F.2d at 898 n.15. Rather, "[f]inancially strapped institutions may * * * comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population." *Roberts*, 998 F.2d at 830; see, *e.g.*, *Miami Univ. Wrestling Club*, 302 F.3d at 613 (same). Moreover, "[w]hile the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution." *Kelley*, 35 F.3d at 272; see, *e.g.*, *Neal*, 198 F.3d at 772 (same).

There is no merit to petitioner's position that "the writ should [nevertheless] be granted because the circuits have reached an incorrect 9-0 unanimity on Title IX's Three-Part Test, * * * which only this Court's supervisory power can correct." Pet. 12. The rulings below present no error for this Court to rectify. The courts below properly declined petitioner's invitation to grant interim relief on the basis that every court of appeals to address the underlying questions has properly upheld the DOE policies at issue. See *Chalenor*, 291 F.3d at 1047 n.4 ("[T]he [challenged policy] interpretation has guided [DOE's] enforcement of nondiscrimination in athletics for over two decades, without change from Congress. No court has ever held it to be invalid.").[5]

b. The courts below properly evaluated petitioner's procedural as well as its substantive claims. Petitioner argues (Pet. 21-23) that whatever authority HEW had for interpreting Title IX was not transferred to DOE. This Court has rejected that argument before, see *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 516 n.4 (1982)

---

[5] Petitioner's attempted reliance (Pet. 12, 33) on *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), is misplaced. *Parents Involved* concerned "racial classifications and the higher degree of scrutiny to which they are subject." Pet. App. 58a-59a. As the district court recognized, "in the realm of collegiate athletics," gender classifications "are simply different from racial classifications." *Id.* at 60a. Thus, "'Congress [has] recognized that addressing discrimination in athletics present[s] a unique set of problems not raised in areas such as employment and academics.' * * * Given the unique problems raised by discrimination in athletic opportunity, it would be inappropriate to import a body of law developed in other contexts." *Boulahanis* v. *Board of Regents*, 198 F.3d 633, 638 n.2 (7th Cir. 1999) (quoting *Kelley*, 35 F.3d at 270), cert. denied, 530 U.S. 1284 (2000).

("HEW's functions under Title IX were transferred in 1979 to the Department of Education"), and with good reason. In 1979, Congress divided HEW into two new agencies: DOE and the Department of Health and Human Services (HHS). See Pet. App. 33a-34a. HEW's Title IX regulations, see 45 C.F.R. 86.41, were subsequently recodified as DOE regulations without substantial change, see 34 C.F.R. 106.41. Moreover, DOE has effectively incorporated the Policy Interpretation as its own. See *Cohen I*, 991 F.2d at 895, 896 n.10; *Horner* v. *Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 273 n.6 (6th Cir. 1994); see also Pet. App. 99a (1996 Clarification); *id.* at 129a (2003 Clarification); *id.* at 135a (2005 Clarification).

Petitioner also argues (Pet. 26-28) that DOE's 1996, 2003, and 2005 Clarifications are invalid because they were not promulgated pursuant to formal notice-and-comment rulemaking. But as the district court recognized, the enforcement policies at issue "are interpretive guidelines that the Department was not obligated to issue in the first place." Pet. App. 64a (quoting *National Wrestling Coaches Ass'n* v. *Department of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005)); see *College Sports Council* v. *Department of Educ.*, 465 F.3d 20 (D.C. Cir. 2006), cert. denied, 128 S. Ct. 129 (2007). Thus, notice and comment rulemaking was not required, because "interpretive guidelines are not subject to the APA's notice and comment procedures." Pet. App. 64a.

Petitioner additionally argues (Pet. 29-31) that the 1979 Policy Interpretation is not actually law, because it was not signed by the President. While Title IX provides that any implementing "rule, regulation, or order" must be approved by the President, 20 U.S.C. 1682, "the

statute does not require Presidential approval each and every time an agency issues interpretive guidelines," Pet. App. 65a. Petitioner's "argument to the contrary has been expressly rejected by other courts." *Ibid.* Before this Court, as before the courts below, petitioner "offers no case directly on point that supports its challenge." *Id.* at 13a; see *ibid.* ("In the end, there are no cases directly supporting [petitioner's] procedural challenges.").

c. Because petitioner's substantive and procedural claims have been rejected by every court to consider them, it has shown no likelihood of success on the merits. The district court therefore did not abuse its discretion in denying petitioner's request for a preliminary injunction. But even were an assessment of the public interest necessary, the court of appeals concluded that "the district court did not clearly err in determining that the public interest favored JMU's ability to chart [its] own course in providing athletic opportunities." Pet. App. 14a (brackets in original; internal quotation marks and citation omitted). That fact-bound conclusion provides no occasion for this Court's review.

d. Finally, even assuming that the district court arguably abused its discretion by declining to grant the preliminary injunction, this Court ordinarily does not review interlocutory decisions of the sort at issue here. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see generally Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280 (9th ed. 2007). Petitioner will be able to seek review of any final judgment entered on its constitutional and statutory claims. Because the athletic teams at issue

already have ceased to exist (due in part to petitioner's delay in bringing suit against JMU and requesting injunctive relief), there is no pressing need for this Court to review the court of appeals' decision. The lack of finality of the judgment below is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
BARBARA C. BIDDLE
THOMAS M. BONDY
Attorneys

FEBRUARY 2009

130

No. 08-672

FILED
MAR 17 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EQUITY IN ATHLETICS, INC.,

Petitioner,

v.

DEPARTMENT OF EDUCATION, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
Fax: (202) 318-2254

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869
Fax: (505) 848-1882

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Petitioner's Supplemental Brief 1
Introduction 1
I. EIA Has Standing under *Summers* 1
A. EIA Has Standing for "GVR" Relief 3
B. EIA Has Standing for Full Review 3
II. Three-Part Test Warrants No Deference under *Wyeth* 7
A. *Wyeth* Conflates Agency Deference with Notice and Comment 8
B. Three-Part Test Deserves No Deference under *Wyeth* 11
Conclusion 13

TABLE OF AUTHORITIES

Agripost, Inc. v. Miami-Dade County, ex rel. Manager, 195 F.3d 1225 (11th Cir. 1999) 5

Bemis Brothers Bag Co. v. U.S., 289 U.S. 28 (1933) 6

Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984) 11

Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996). 6

Colacicco v. Apotex, Inc., 432 F.Supp.2d 514 (E.D. Pa. 2006) 10

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) 4

Diamond v. Charles, 476 U.S. 54 (1986) 2

Dolenc v. Love, 40 F.3d 656 (3rd Cir. 1994) 5

Ehlert v. U.S., 402 U.S. 99 (1971) 11

Envt'l Protection Information Center, Inc. v. Pacific Lumber Co., 257 F.3d 1071 (9th Cir. 2001) 5

Fertilizer Institute v. U.S. E.P.A., 935 F.2d 1303 (D.C. Cir. 1991) 10

Fitzgerald v. Barnstable School Committee, 504 F.3d 165 (1st Cir. 2007) 2-3

Fitzgerald v. Barnstable School Committee, No. 07-1725 (U.S.) 2-3, 6, 13

In re DES Litigation, 7 F.3d 20 (2nd Cir. 1993) 5

Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007) 5

Leslie Salt Co. v. U.S., 55 F.3d 1388 (9th Cir. 1995) 9-10

Lewis v. Casey, 518 U.S. 343 (1996) 2
Long Island Care at Home, Ltd. v. Coke, 127 S.Ct. 2339 (2007) 8
Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 11
McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988) 8-9
Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992) 10
Nat'l Presto Industries, Inc. v. Dazey Corp., 107 F.3d 1576 (Fed. Cir. 1997) 5
Pearson v. Callahan, 129 S.Ct. 808 (2009) 6-7
Sea-Land Service, Inc. v. Department of Transp., 137 F.3d 640 (D.C. Cir. 1998) 5
Seminole Rock & Sand Co., 325 U.S. 410 (1945) 11
Sierra Club v. Morton, 405 U.S. 727 (1972) 2
Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S.Ct. 2531 (2008) 6
Summers v. Earth Island Institute, 129 S.Ct. 1142 (2009) 1-6
Summers v. Earth Island Institute, No. 07-463 (U.S.), ... 1
University of Texas v. Camenisch, 451 U.S. 390 (1981) 5
Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978) 10-11
Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280 (7th Cir. 1993) 5

Wyeth v. Levine, ___ S.Ct. ___,
2009 WL 529172 ..... 1, 3, 7-11, 13
Wyeth v. Levine, No. 06-1249 (U.S.)..... 1

Statutes

U.S. CONST. art. III, §2..... 1, 2
U.S. CONST. amend. XIV 3
Administrative Procedure Act,
5 U.S.C. §§551-706..... 8-11
5 U.S.C. §553(b)(3) 8
5 U.S.C. §553(b)(A)..... 8, 10
5 U.S.C. §553(c) 8, 12
5 U.S.C. §706(2)(D)..... 8
Title IX of the Education Amendments of 1972,
§§1681-1688.....*passim*
42 U.S.C. §1983 3

Legislative History

117 Cong. Rec. 30,409 (1971)..... 12
117 Cong. Rec. 39,251 (1971)..... 12
117 Cong. Rec. 39,259 (1971)..... 12
117 Cong. Rec. 39,262 (1971)..... 12
118 Cong. Rec. 5812-13 (1972)..... 12

Rules, Regulations and Orders

Nondiscrimination on the basis of sex in
education programs and activities receiving or
benefiting from federal financial assistance, 40
Fed. Reg. 24,128 (1975)..... 12
Requirements on Content and Format of Labeling
for Human Prescription Drugs and Biologics;

Requirements for Prescription Drug Product Labels, 65 Fed. Reg. 81,082 (2000) 9
Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922 (2006) 9
FED. R. CIV. P. 15 ..... 2, 6
FED. R. CIV. P. 60 2
Sup. Ct. Rule 15.8 ..... 1, 3
Sup. Ct. Rule 23 4

Other Authorities

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong. (1975) 12

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner Equity in Athletics, Inc. ("EIA") respectfully files this supplemental brief pursuant to this Court's Rule 15.8 to explain the relevance of *Summers v. Earth Island Institute,* No. 07-463 (U.S.), and *Wyeth v. Levine,* No. 06-1249 (U.S.), to EIA's petition for a writ of *certiorari.*

INTRODUCTION

After EIA filed its reply brief on February 20, 2009, this Court decided *Summers* and *Wyeth.* As explained in the following two sections, *Summers* relates to EIA's standing to seek not only interim injunctive relief but also appellate review of the decisions below, *Summers v. Earth Island Institute,* 129 S.Ct. 1142 (2009), and *Wyeth* relates to the deference due to respondent Department of Education's "Three-Part Test" on which respondent James Madison University relied to eliminate EIA members' athletic teams and on which the lower courts relied to deny EIA's request for interim injunctive relief. *Wyeth v. Levine,* ___ S.Ct. ___, 2009 WL 529172. Moreover, as further explained in the following two sections, *Summers* and *Wyeth* also both provide additional reasons for this Court to grant the petition for a writ of *certiorari* to clarify important issues of Article III standing and administrative law.

I. EIA HAS STANDING UNDER *SUMMERS*

Summers challenged agency rules and their application at national forests across the country, with particular emphasis on one forest project pending when plaintiffs filed suit. Unfortunately for plaintiffs, they settled their claim as to that forest project, which left them without evidence of standing

to support a permanent injunction. (Their specific affidavits supported standing only to challenge the rule's application at the initial forest project, which no longer injured them, and the balance of their evidence ranged from nonexistent to vague and speculative.) Because a judgment had been entered, plaintiffs could not supplement the record under FED. R. CIV. P. 15 without first seeking relief under FED. R. CIV. P. 60. *Summers,* 129 S.Ct. at 1153; *cf. Sierra Club v. Morton,* 405 U.S. 727, 735 n.8 (1972) ("[o]ur decision does not, of course, bar the Sierra Club from seeking... to amend its complaint by a motion under Rule 15"); *cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (lesser showing on standing required at litigation's earlier stages than on merits). *Summers* has obvious relevance whenever litigation outlasts the evidence that establishes the case or controversy.

Under Article III, EIA must have standing to seek this Court's appellate review and must have standing for each form of relief sought. *Diamond v. Charles,* 476 U.S. 54, 65-66 (1986); *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). This Court could provide EIA with two types of relief, one more immediate than the other. First, the Court could "GVR" this case by simultaneously granting the petition for a writ of *certiorari,* vacating the decisions below, and remanding for consideration in light of either or both of *Fitzgerald* on substantive grounds[1]

---

[1] In the Court of Appeals, respondents associated with the James Madison University cited *Fitzgerald*

(Footnote cont'd on next page)

or *Wyeth* on deference grounds. *See* EIA Reply Br. at 1-2 (*Fitzgerald*); Section II, *supra* (*Wyeth*). Second, the Court could issue the writ and hear EIA's appeal, presumably next term. The following two sections address the impact of *Summers* on EIA's standing for those two forms of relief.

A. EIA Has Standing for "GVR" Relief

If this Court issues a GVR this Spring, EIA would have time to seek preliminary and permanent injunctive relief, well in advance of next academic year, when EIA members injured in their freshmen year will be seniors. That provides sufficient redress for GVR relief.

B. EIA Has Standing for Full Review

As indicated in the prior section, EIA's

(Footnote cont'd from previous page.)

v. Barnstable School Committee, 504 F.3d 165, 179-80 (1st Cir. 2007), for the proposition that Title IX preempts EIA's invoking the Fourteenth Amendment under 42 U.S.C. §1983. *See* University Appellees' Br. at 15 & n.24. In its decision issued on January 21, 2009, in *Fitzgerald v. Barnstable School Committee,* No. 07-1725 (U.S.), this Court unanimously rejected the University's preemption theory. Although the University waived its right to respond to EIA's petition for a writ of *certiorari* on December 15, 2008, in advance of the original deadline to respond, the federal respondents' multiple extensions (through February 4, 2009) and this Court's Rule 15.8 would have allowed the University to respond to *Fitzgerald.*

affidavits run at least through the end of the 2009-10 academic year. As such, a decision that this Court issues next term would not benefit all of the affected teams. Indeed, unless the decision comes before the seasons for the spring sports, a decision next term may not reinstate *any* teams for next year (*i.e.*, 2009-10). Under that circumstance, EIA could find itself in a position similar to Earth Island Institute in *Summers*, where EIA's affidavits on imminent injury and redressability have become dated. *Summers*, 129 S.Ct. at 1148. This section addresses EIA's standing for this Court to review the decisions below, assuming *arguendo* that the time comes during this appeal that EIA's affidavits no longer support standing for interim relief.

First, as a practical matter, if this Court grants EIA's petition this Spring, EIA would seek interim relief under this Court's Rule 23 to restore the demoted "club" programs back to intercollegiate status, pending this Court's resolution of the case next term. By reinstating the unlawfully demoted teams, this Court would be assured of an ongoing controversy to maintain those teams, even after the original students graduate.

Second, absent such a stay and even after the original students all graduate, EIA would nonetheless have standing to seek reversal of the lower courts' decisions. Citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333-34 (1980), the weight of circuit authority holds that avoiding an

adverse effect from collateral estoppel or law of the case provides a sufficient case or controversy to support an appeal.[2] By contrast, several circuits have found it circular to argue that preclusion can support standing to appeal when preclusion attaches only to appealable holdings.[3] As explained below, EIA has standing to overturn the Fourth Circuit's impermissible collateral attack doctrine, App. 13a, even if the time comes during this appeal when EIA no longer has standing for interim relief.

In general, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Notwithstanding that general rule, however, courts sometimes give dispositive effect to rulings on interim relief during the later hearing of

---

[2] *See, e.g., Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 427 (5th Cir. 2007); *Agripost, Inc. v. Miami-Dade County, ex rel. Manager*, 195 F.3d 1225, 1230 (11th Cir. 1999); *In re DES Litigation*, 7 F.3d 20, 23 (2nd Cir. 1993); *Dolenc v. Love*, 40 F.3d 656, 657 (3rd Cir. 1994); *Nat'l Presto Industries, Inc. v. Dazey Corp.*, 107 F.3d 1576, 1579 (Fed. Cir. 1997).

[3] *See, e.g., Envt'l Protection Information Center, Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1075-76 (9th Cir. 2001); *Sea-Land Service, Inc. v. Department of Transp.*, 137 F.3d 640, 648-49 (D.C. Cir. 1998); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282-83 (7th Cir. 1993).

the merits. *See, e.g., Cohen v. Brown University,* 101 F.3d 155, 167-69 (1st Cir. 1996). Unless overturned by this Court, the Fourth Circuit's erroneous "impermissible collateral attack" doctrine could prevent EIA's obtaining relief against the University respondents in the §1983 action that this Court's *Fitzgerald* decision has now authorized.

Unlike the litigation in *Summers,* this litigation has not resolved to a final judgment, and EIA remains free under FED. R. CIV. P. 15 to seek nominal damages and out-of-pocket costs (*i.e.,* anything that does not require the participation of individual members) assigned to EIA by its members. *Sprint Communications Co., L.P. v. APCC Services, Inc.,* 128 S.Ct. 2531, 2542 (2008) (standing to seek assigned damages); *cf. Bemis Brothers Bag Co. v. U.S.,* 289 U.S. 28, 34 (1933) ("[t]he rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not"). Unless overturned by this Court, the Fourth Circuit's "impermissible collateral attack" doctrine could prevent a hearing on the constitutional merits against the University officer defendants, to which EIA otherwise is presumptively entitled.[4] *Pearson v.*

---

[4] EIA's complaint also includes as "Doe defendants" seven other Virginia state schools and their officers, Court of Appeals Joint Appendix 16-17 (¶¶8-11) ("CAJA"), against which EIA also is entitled to seek relief.

Callahan, 129 S.Ct. 808, 818-22 (2009). Under the circumstances, EIA will retain standing to appeal that Fourth Circuit doctrine, even after EIA no longer has standing for a preliminary injunction against James Madison University.

II. THREE-PART TEST WARRANTS NO DEFERENCE UNDER *WYETH*

In *Wyeth,* the majority decision and Justice Breyer's concurrence both emphasize that – while federal regulations may perhaps preempt state law – a *Federal Register* preamble has lesser claims to that power. *See* slip op. at 24 (Stevens, J.); slip op. 1-2 (Breyer, J., concurring). In addition, Justice Stevens notes that the preamble to the proposed rule indicated that the agency would not address preemption, while the preamble to the final rule purported to preempt state law. *Wyeth,* slip op. at 20-21. Under the circumstances in *Wyeth,* this Court concluded (slip op. at 21, 24) that the "agency's views ... are inherently suspect in light of this procedural failure" and "do[] not merit deference for the reasons we have explained."

Those reasons included (1) the agency's reaching an issue in the final rule's preamble that the agency eschewed in the proposed rule's preamble, (2) the preamble's status as less than a regulation with the force of law, (3) the lack of thoroughness, consistency, and persuasiveness in the agency's position, (4) the agency's failing to provide States or interested parties notice or an opportunity for comment, (5) the preamble's inconsistency with congressional intent, and (6) the agency's reversing its longstanding position without adequately

explaining the departure. *Wyeth,* slip op. at 20-24. As explained below, the Department's adoption of the Three-Part Test presents all the same issues and thus *Wyeth* counsels against deference. Before applying *Wyeth,* however, EIA respectfully submits that this Court should clarify *Wyeth* itself to avoid confusion from its conflating divergent aspects of administrative law.

A. *Wyeth* Conflates Agency Deference with Notice and Comment

The Administrative Procedure Act ("APA") requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. §553(b)(3), to offer the opportunity to comment, and to respond to those comments in conjunction with its final rule. *Id.* §553(c). For interpretive rules, however, the APA waives the notice-and-comment requirements altogether. 5 U.S.C. §553(b)(A). Although the APA and courts treat interpretive rules and "legislative rules" subject to the notice-and-comment requirements differently, *Wyeth* apparently conflates the two.

Where the notice-and-comment requirements apply, the final rule must be a "logical outgrowth" of the proposed rule, *Long Island Care at Home, Ltd. v. Coke,* 127 S.Ct. 2339, 2351 (2007) (collecting cases), or the final rule is void *ab initio* as "without observance of procedure required by law." 5 U.S.C. §706(2)(D). If "the notice was inadequate, [the agency's] consideration of the comments received in

response thereto..., no matter how careful, cannot cure the defect." *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1323 (D.C. Cir. 1988) (collecting cases). If the APA notice-and-comment requirements applied to the agency action at issue in *Wyeth,*[5] that agency action was not merely an agency theory that deserved little deference: it was a nullity.

By contrast, if the agency action at issue in *Wyeth* was a mere interpretation, then the deference issue arises. Indeed, there is ample authority for the proposition that a preamble to a legislative rule is an interpretive rule. *See, e.g., Leslie Salt Co. v. U.S.,* 55 F.3d 1388, 1394 (9th Cir. 1995) ("it is plausible to find

---

[5] *See Wyeth,* slip op. at 21 ("the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment"). To apply the "logical outgrowth" rule to the agency action in *Wyeth,* the Court would have needed consider whether the preemption announced in the notice of final rulemaking related sufficiently to "the agency['s] seek[ing] comment on whether it could take different or additional measures to alleviate product liability concerns," 65 Fed. Reg. 81,082, 81,088 (2000), notwithstanding the agency's "determin[ing] that this proposed rule does not contain policies that have federalism implications or that preempt State law." 65 Fed. Reg. at 81,103; *cf.* 71 Fed. Reg. 3922, 3969 (2006) ("[a]lthough the proposed rule did not propose to preempt state law, it did solicit comment on product liability issues").

that the preamble is merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act"); *Fertilizer Institute v. U.S. E.P.A.*, 935 F.2d 1303, 1309 (D.C. Cir. 1991) (because "EPA's preamble passage represents the agency's attempt to interpret the meaning of a statutory provision," "the rule is interpretative"); *Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 239 (D.C. Cir. 1992) ("[t]he rule, but not the preamble, was subject to notice and comment"); *cf. Colacicco v. Apotex, Inc.*, 432 F.Supp.2d 514, 534 (E.D. Pa. 2006) (holding that the "Preemption Preamble" at issue in *Wyeth* "is an interpretive rule"). If preamble language is merely interpretive, the APA's notice-and-comment procedures do not even apply, 5 U.S.C. §553(b)(A), which means that the logical-outgrowth rule does not apply either.

EIA respectfully submits that the *Wyeth* preamble was an interpretive rule, on which the agency did not owe the States or the interested public an opportunity to comment. *Compare Wyeth*, slip op. at 21 (suggesting the right to comment) *with* 5 U.S.C. §553(b)(A) (no right to comment). Indeed, this Court heretofore has "caution[ed] reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 524-25 (1978) (apart from the APA's and other statutory requirements, "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the

responsibility for substantive judgments"). As such, *Wyeth* departs from this Court's practice by faulting the denial of notice and comment that the APA does not require.

Although not applied in *Wyeth*, the *Seminole Rock* doctrine often leads courts to confer greater-than-*Chevron* deference to spurious, post-promulgation agency interpretations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) ("ultimate criterion" for judicial construction of ambiguous regulation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Ehlert v. U.S.*, 402 U.S. 99, 105 (1971) (reviewing court must accept a "plausible construction of the... regulation"); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991); *cf. Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). Whereas *Chevron* encourages legislators to "pass the buck" by enacting vague statutes for agencies to implement, *Seminole Rock* encourages agencies to "hide the ball" by promulgating vague regulations that they themselves authoritatively interpret, post-promulgation. Unfortunately, *Wyeth* gives the lower courts few clues on when to rely on *Seminole Rock* and when to rely on *Wyeth*.

B. Three-Part Test Deserves No Deference under *Wyeth*

EIA respectfully submits that *Wyeth* counsels for rejecting the deeply flawed agency interpretation on which the respondents and lower courts rely here. The Department issued the Three-Part Test in a

1996 memorandum (App. 99a-128a), not a final rule, based on its misunderstanding of its predecessor's 1979 actions. In doing so, the Department reversed without comment not only its predecessor's assurance to Congress that "[d]ocumentation of a failure to meet the [policy interpretation's] compliance factors does not constitute proof that an educational institution has violated Title IX," CAJA 133, 305-07, but also its predecessor's contemporaneous interpretation that Title IX's regulations require assessing the interests of both genders. Pet. at 10 (citing 40 Fed. Reg. 24,128, 24,134 (1975) and *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., at 440 (1975)). Here, in reliance on the Department, the University eliminated ten teams (five expressly *because of* gender), without assessing interest in those sports or comparing that interest to the interest in other sports, for the express purpose of "be[ing] in compliance with the proportionality test of Title IX," CAJA 200, a statute that Congress intended to eliminate all "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." Pet. at 5 (quoting 117 Cong. Rec. 30,409, 39,251, 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972)).

Although the Department and its predecessor provided the opportunity for comment, that opportunity is hollow where the agency simply sidesteps those comments, without responding. 5 U.S.C. §553(c); App. 100a ("Others... suggested that the Clarification, or the Policy Interpretation itself,

provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments."). If children were not being hurt, the Department's serial contradictory positions would be humorous. *Compare, e.g.*, CAJA 134-36, 305-07 (arguing to Congress that the 1979 policy interpretation's "nature does not require the Department to follow notice and comment procedures" to evade procedural requirements because "provision of a comment period may be regarded as a voluntary effort") *with* Fed'l Respondent's Br. at 2 (arguing to this Court that the 1979 policy interpretation issued "following notice and comment"). Under *Wyeth*, the Department's new position deserves no deference.

CONCLUSION

This Court should grant the petition for writ of *certiorari*. If it issues the writ and summarily vacates and remands for consideration in light of *Fitzgerald* on substantive grounds, this Court also should direct consideration in light of *Wyeth* on deference grounds.

March 17, 2009

Respectfully submitted,

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
* Counsel of Record

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869

Supreme Court, U.S.
FILED
FEB 20 2009
OFFICE OF THE CLERK

(3)

No. 08-672

IN THE

Supreme Court of the United States

EQUITY IN ATHLETICS, INC.,
PETITIONER,

v.

DEPARTMENT OF EDUCATION, *ET AL.*,
RESPONDENTS.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
Fax: (202) 318-2254

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869
Fax: (505) 848-1882

* Counsel of Record

TABLE OF CONTENTS

Table of Contents i
Table of Authorities... ii
Petitioner's Reply Brief 1
I. Fourth Circuit Conflicts with this Court on Title IX Preclusion 1
II. Fourth Circuit Applies the Wrong Standard for Interim Relief 3
III. Legal Errors Below Require This Court's Appellate Supervision 5
A. Appellate Review of Three-Part Test is Inadequate and Requires Supervision 6
B. Three-Part Test is Procedurally Invalid..... 10
C. Public Interest Favors Injunction..... 11
D. Legal Error Constitutes Abuse of Discretion and Requires Correction 13
Conclusion 13

TABLE OF AUTHORITIES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 9

American Constr. Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372 (1893) 14

Blackwelder Furniture Co. v. Seilig Mfg. Co.,
550 F.2d 189 (4th Cir. 1977) 3

Boulahanis v. Bd. of Regents,
198 F.3d 633 (7th Cir. 1999) 7

BP Chem. Ltd. v. Formosa Chem. & Fibre Corp.,
229 F.3d 254 (3rd Cir. 2000) 3

Chalenor v. Univ. of N.D.,
291 F.3d 1042 (8th Cir. 2002) 7

Cohen v. Brown Univ.,
991 F.2d 888 (1st Cir. 1993) 8-9

Cohen v. Brown Univ.,
101 F.3d 155 (1st Cir. 1996) 8-9

Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989) 9

Cooper Indus., Inc. v. Aviall Serv., Inc.,
543 U.S. 157 (2004) 7-8

Ensley Branch, NAACP v. Seibels,
31 F.3d 1548 (11th Cir. 1994) 9

Ex parte Young, 209 U.S. 123 (1908) 1

Fitzgerald v. Barnstable Sch. Comm.,
129 S.Ct. 788 (2009) 1-2

Fla. Audubon Soc'y v. Bentsen,
94 F.3d 658 (D.C. Cir. 1996) (*en banc*) 10

Horner v. Kentucky High Sch. Athletic Ass'n,
43 F.3d 265 (6th Cir. 1995) 8

Horner v. Kentucky High Sch. Athletic Ass'n,
206 F.3d 685 (6th Cir. 2000) 8
I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.,
502 U.S. 183 (1991) 2
Ideal Indus., Inc. v. Gardner Bender, Inc.,
612 F.2d 1018 (7th Cir. 1979) 3, 4
Indep. Cmty. Bankers of Am. v. Bd. of Gov'rs of Fed. Reserve Sys., 195 F.3d 28 (D.C. Cir. 1999). 10
Johnson v. Yellow Cab Transit Co.,
321 U.S. 383 (1944) 5
Kelley v. Bd. of Trs.,
35 F.3d 265 (7th Cir. 1994) 1, 2, 7, 8-9
Metro Broad., Inc. v. F.C.C.,
497 U.S. 547 (1990) 8, 9
Miami Univ. Wrestling Club v. Miami Univ.,
302 F.3d 608 (6th Cir. 2002) 7
Milwaukee County Pavers Ass'n v. Fiedler,
922 F.2d 419 (7th Cir. 1991) 2
Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 4-5
Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.,
366 F.3d 930 (D.C. Cir. 2004) 10
Neal v. Bd. of Trs.,
198 F.3d 763 (9th Cir. 1999) 9
Pederson v. Louisiana State Univ.,
213 F.3d 858 (5th Cir. 2000) 7
Perez v. Ledesma, 401 U.S. 82 (1971) 1
Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806 (1945) 5

Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75 (4th Cir. 1989) 4

Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) 7

Safety-Kleen, Inc. v. Wyche, 274 F.3d 846 (4th Cir. 2001) 3

Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3rd Cir. 1993) 7

Statutes

Title IX, Educ. Amend. of 1972, §§1681-1688 ..*passim*

28 U.S.C. §1331 1

28 U.S.C. §1343(3) 1

42 U.S.C. §1983 1

Judiciary Act of 1875, 18 Stat. 470 1

Civil Rights Act of 1871, 17 Stat. 13 1

Rules, Regulations and Orders

45 C.F.R. pt. 86 8

S. Ct. Rule 32.3 12

Other Authorities

Sandra Edelman, *Delay in Filing Preliminary Injunction Motions: Update 2002*, 92 TRADEMARK REP. 647 (2002) 4

Edward Fadeley, *The Clean-Hands Doctrine in Oregon*, 37 OR. L. REV. 160 (1958) 5

Thomas J. Speiss, III & Stephen M. Levine, *An Analysis of the Factors that Determine When and How to Resolve a Trademark Dispute*, 11 RICHMOND J. OF L. & TECH. 1 (2004) 4

PETITIONER'S REPLY BRIEF

Equity in Athletics, Inc. ("EIA") respectfully files this reply brief in response to the opposition filed by the Department of Education ("DOE"). The respondents associated with James Madison University ("JMU") waived its opposition.

I. FOURTH CIRCUIT CONFLICTS WITH THIS COURT ON TITLE IX PRECLUSION

By suggesting that JMU's attempt to comply with federal "guidance" makes "impermissible" EIA's challenge to the constitutionality of JMU's actions, App. 12a (quoting *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7th Cir. 1994)), the Fourth Circuit found Title IX to preempt constitutional review, both under §1983 and under §1331 and *Ex parte Young*.[1] Because this Court now has held that Title IX does not preempt constitutional review under §1983, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S.Ct. 788, 795-96 (2009), the Fourth Circuit's "impermissible collateral attack" holding cannot stand.

---

[1] "[T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.*

DOE argues that the Fourth Circuit meant "impermissible" in the sense that "[JMU] could not be held liable for doing what Title IX validly permits." DOE Opp'n, at 9. That is neither the definition of "impermissible" nor what the Seventh Circuit meant by the term. *See Kelley*, 35 F.3d at 272 (citing *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991)). In *Fiedler*, the Seventh Circuit meant that a State's reverse discrimination in reliance on concededly *valid* federal program was immune to collateral attack. *Fiedler*, 922 F.2d at 424-25. Similarly, in *Fiedler*, it was equally clear that State action outside the federal program was open to constitutional attack. *Id.* Here, EIA does not concede the validity of the federal program and argues that JMU acted outside that program: there is nothing either impermissible or collateral in EIA's attack.

In *Kelley*, by contrast, the Seventh Circuit went well beyond its cited authority (*Fiedler*) and held that as-applied challenges were impermissible, based only on that Court's rejection of a *facial* challenge to the federal program. *Kelley*, 35 F.3d at 272. As EIA explains and DOE does not rebut, the fact that a federal program is not *facially* unconstitutional does not mean that that program is constitutional *as applied*. Pet. at 12-18, 33-34; *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("[t]hat the regulation may be invalid as applied... does not mean that the regulation is facially invalid"). This Court's *Fitzgerald* decision requires reversing the Fourth and Seventh Circuits' impermissible-collateral-attack doctrine.

II. FOURTH CIRCUIT APPLIES THE WRONG STANDARD FOR INTERIM RELIEF

DOE does not (and cannot) dispute that the Fourth Circuit's *Blackwelder* test "contravene[s] Supreme Court precedents by overvaluing the inquiry into the relative equities." Pet. at 23 (quoting *Safety-Kleen, Inc. v. Wyche,* 274 F.3d 846, 868 (4th Cir. 2001) (Luttig, J., concurring)). Instead, DOE argues that EIA "can hardly be heard to complain: it could not satisfy that allegedly laxer standard." DOE Opp'n, at 10-11. As Judge Luttig recognized, however, the problem is not whether the resulting standard is more lenient or more strict (it is both); the problem is that the Fourth Circuit test overvalues the weighing of relative equities. That is something that this Court can and should correct.

DOE also fails to provide this Court a candid assessment of the split in the circuits over whether a plaintiff's delay, standing alone, can negate entitlement to a preliminary injunction. *Compare, e.g.,* DOE Opp'n at 11 (citing cases) *with Ideal Indus., Inc. v. Gardner Bender, Inc.,* 612 F.2d 1018, 1025 (7th Cir. 1979) (analyzing whether delay lulled defendant into a false sense of security or caused defendant to act in reliance on the plaintiff's delay) *and BP Chem. Ltd. v. Formosa Chem. & Fibre Corp.,* 229 F.3d 254, 264 (3rd Cir. 2000) (plaintiff's good faith efforts to investigate an infringement and to determine how serious an infringement is does not preclude a finding of irreparable harm). The cases reveal one and arguably two distinct circuit splits.

First, as indicated, the lower courts are split on the extent to which a defendant must couple

plaintiff's delay with that delay's having lulled the defendant into a false sense of security or reliance. Sandra Edelman, *Delay in Filing Preliminary Injunction Motions: Update 2002,* 92 TRADEMARK REP. 647, 654-55 (2002); Thomas J. Speiss, III & Stephen M. Levine, *An Analysis of the Factors that Determine When and How to Resolve a Trademark Dispute,* 11 RICHMOND J. OF L. & TECH. 1, 57 & n.150 (2004) ("lack of uniformity among the various circuit courts as to the relevance of the defendant's prejudicial reliance continues to be shown in cases [recently] reported") (quoting Edelman, *supra*). Under the circumstances, JMU cannot claim that EIA's actions lulled it or occasioned any reasonable reliance on JMU's part that EIA would not seek interim relief.

Second, the lower courts also are split on whether to characterize the relief to defendants as laches or as something else. *Compare Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel,* 872 F.2d 75 (4th Cir. 1989) ("a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction") (interior quotations omitted) *with Gardner Bender,* 612 F.2d at 1025 (analyzing delay as laches and holding that "mere passage of time cannot constitute laches"). While this second split may merely restate the first, *see, e.g., Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 (2002) (laches requires "lack of diligence by the party against whom the defense is asserted" and "prejudice to the party asserting the

defense"), it has independent relevance here.

It is uncontested that JMU planned to eliminate the ten teams for two years in unlawful secret meetings that violated Virginia's open-meeting laws. It is also uncontested that, during those two years, JMU recruited students to participate on the ten teams without disclosing their potential elimination. Under the circumstances, if the delay defense is laches, no court should hear JMU raise it: "he who comes into equity must come with clean hands," an equitable doctrine that "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief" or "fraud or deceit as to the controversy in issue." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (interior quotations omitted); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387-88 (1944) (unclean hands can apply to defendants); Edward Fadeley, *The Clean-Hands Doctrine in Oregon*, 37 OR. L. REV. 160, 163 & nn.34-35 (1958) (although typically applied against plaintiffs, unclean hands also can deny defendants' reliance on equitable defenses); Pet. at 24. Here, JMU's unclean hands should deny resort to any equitable defense.

III. LEGAL ERRORS BELOW REQUIRE THIS COURT'S APPELLATE SUPERVISION

DOE rejects EIA's argument that the lower courts' unanimity requires this Court's supervision, DOE Opp'n, at 13, but offers little beyond that unanimity to rebut EIA's arguments, which those lower courts did not consider. EIA respectfully submits that only this Court can undo the circuits'

ossified, compounding misapplications of constitutional and administrative law. Without this Court's intervention, neither EIA's JMU members nor similarly situated plaintiffs anywhere (including EIA members at other schools) can protect their constitutional rights.

A. Appellate Review of Three-Part Test Requires Supervision

Without addressing EIA's argument that balance for balance's sake is not a legitimate government interest, DOE argues against importing the reasoning of this Court's race-discrimination cases into gender discrimination. *Compare* Pet. at 33-34 *with* DOE Opp'n, at 13 & n.5. DOE also ignores EIA's argument that the circuits are split on whether Congress intended Title IX as a strict-scrutiny statute, Pet. at 33, and that EIA members' First-Amendment injuries trigger strict scrutiny. Pet at 34. DOE does, of course, cite numerous cases that upheld the Three-Part Test, DOE Opp'n, at 12, which EIA distinguishes here.

Although eight appellate courts have found the Three-Part Test lawful by deferring to DOE *under Title IX*, they devoted surprisingly little thought on the Three-Part Test's *constitutionality*. What little thought they have devoted relies on superseded Court decisions or case-specific facts. Often, when women sought to enforce their regulatory "rights" under the Three-Part Test, the

Equal Protection Clause simply did not come up.[2] Even more often, appellate courts have expressly declined to address the Equal Protection Clause's application to the Three-Part Test.[3] Because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon,

---

[2] *See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (silent on constitutional issues); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 884 (5th Cir. 2000) (reaching only Title IX).

[3] *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 614 (6th Cir. 2002) ("Nothing in any version of the complaint can be construed as a direct [constitutional] challenge to either the law, the regulations or the Policy Interpretation"); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1049 (8th Cir. 2002) ("plaintiffs admit that they admit that they 'did not assert a constitutional violation' in the District Court..., so we need not decide the constitutional issue"); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999) ("availability of [Title IX] claim preempts the remedies available for sex discrimination under Section 1983"); *Kelley*, 35 F.3d at 272 ("plaintiffs' [constitutional challenge to school's cuts] is merely a collateral attack on the statute and regulations and is therefore impermissible"); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 176 (3rd Cir. 1993) (avoiding constitutional issue because "Congress intended to foreclose a right of action under section 1983").

are not to be considered as having been so decided as to constitute precedents," *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)), the decisions cited in notes 2 and 3 cannot support the Three-Part Test's constitutionality. Only four decisions even remotely address the Three-Part Test's constitutionality.

First, the Sixth Circuit's *Horner* litigation involved an effort to establish a new interscholastic sport for girls. By denying relief under the Equal Protection Clause in *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1995) ("*Horner I*"), but allowing it under the Three-Part Test in *Horner II*, the *Horner* litigation demonstrates that the Equal Protection Clause protects against only actions taken because of gender, *Horner I*, 43 F.3d at 276, whereas the regulations provide an affirmative "equal opportunity mandate," *Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685, 694 (6th Cir. 2000) ("*Horner II*"). In distinguishing between the regulatory equal-opportunity mandate and the constitutional equal-protection clause, the *Horner* litigation underscores the relevance of EIA's procedural fight over which definition of equal applies, the Three-Part Test or the 1975 regulations.

Second, the First Circuit's *Cohen* litigation and the Seventh Circuit's *Kelley* litigation assessed the Three-Part Test's facial constitutionality under the lesser scrutiny that *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 565-66 (1990), afforded to "benign classifications." *Cohen v. Brown Univ.*, 991 F.2d 888, 901 (1st Cir. 1993); *Kelley*, 35 F.3d at 272.

In *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995), however, this Court overruled *Metro Broadcasting* to require the same scrutiny for all classifications. *Cf. Cohen v. Brown Univ.,* 101 F.3d 155, 170, 183 (1st Cir. 1996) (disregarding *Adarand* under the law of the case doctrine and because Brown had already been found guilty of discrimination). As such, *Cohen* and *Kelley* are unreliable on constitutional issues.

Third, the Ninth Circuit's *Neal* litigation involved a school operating under a consent decree for past gender discrimination.[4] *Neal v. Bd. of Trs.,* 198 F.3d 763, 765 (9th Cir. 1999), Indeed, Moreover, *Neal* technically avoided the constitutional merits, *Neal,* 198 F.3d at 772 (court would apply intermediate scrutiny "were we addressing the constitutional merits"). Instead, *Neal* merely "h[e]ld that the constitutional analysis contained [in *Kelley* and *Cohen*] persuasively disposes of any serious constitutional concerns" with the Three-Part Test as applied in that case. *Neal,* 198 F.3d at 772-73. In sum, *Neal* relies on *Kelley* and *Cohen* (which relied on the overruled *Metro Broadcasting*) and involved a school with a past finding of intentional

---

[4] The circuits are split on whether intermediate scrutiny requires a showing of past discrimination by the entity involved or merely by society at large. *Compare, e.g., Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548, 1580 (11th Cir. 1994) *with Conlin v. Blanchard,* 890 F.2d 811, 816 (6th Cir. 1989).

discrimination against women, which is inapposite.

B. Three-Part Test is Procedurally Invalid

DOE defends against EIA's procedural claims by arguing that interpretative guidelines do not require notice-and-comment rulemaking and Title IX's presidential-approval requirements have "been expressly rejected by other courts," DOE Opp'n, at 14-15 (citing Pet. 65a), by which DOE means two district-court opinions, one unpublished. Pet. 65a-66a. Significantly, like the courts below, DOE simply ignores EIA's argument that the Three-Part Test never took effect under the General Education Provisions Act. Pet. at 31-32.

On EIA's rulemaking argument, DOE offers only *dicta* from *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004) ("*NWCA*"), a case in which the plaintiffs lacked standing. Because the plaintiffs lacked standing, the *NWCA* court's procedural views are not precedential. Pet. at 14 n.7; *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (*en banc*). Moreover, because those views conflict with the law of the D.C. Circuit, Pet. at 28 & n.12, they would not be precedential even if the *NWCA* plaintiffs had had standing. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (earlier-adopted panel decision controls because one three-judge panel cannot overrule another). DOE offers nothing to explain why the change from equal opportunity, based on interest, to equal participation, based on enrollment, escapes a required rulemaking.

On EIA's presidential-approval argument,

DOE offers two district court decisions that imagine a "guidance" exception to the requirements for rules and orders, without either recognizing that issuing non-rule guidance *is an order,* Pet. at 31, or addressing the numerous court decisions that find presidential approval required. Pet. at 30-31 & n.13.

C. Public Interest Favors Injunction

Although all parties agree that Title IX commitments bind JMU, the Fourth Circuit found the public interest to lie in JMU's "chart[ing its] own course," Pet. 14a, which DOE finds dispositive. DOE Opp'n, at 15. Unfortunately, because it accepts federal funds, JMU must chart its course from among those allowed by federal law. Even if it finds the Three-Part Test viable, this Court nonetheless must find that JMU's actions violate DOE's Title IX regime. Because JMU's course violates federal law, it has no right to chart its chosen course.

EIA has consistently argued that JMU's disproportionate elimination of male non-scholarship athletes without correspondingly either increasing female scholarships or decreasing male scholarships creates a "scholarship proportionality" gap that dwarfs the $500,000 that JMU had spent on the ten eliminated teams. Pl.'s Memorandum of Law in Support of Motion for Preliminary Injunction, at 14-15 n.7; Pl.'s Reply to JMU Defendants, at 19; Appellants' Opening Br., at 66; Appellant's Reply Br. at 36 n.10; Pet. at 36. No party and neither lower court disputed this argument; they ignored it.

Based on JMU's post-elimination Equity in Athletics Disclosure Act data provided to DOE,[5] JMU's student body was 39.13% male and 60.87% female (6,820 and 10,608, respectively), its athletic department was 37.12% male and 62.88% female (196 and 332, respectively), and it divided its scholarship dollars as 49.06% male and 50.94% female ($2,243,218 and $2,328,766, respectively). Under the Three-Part Test, men are now the underrepresented gender by 2.01%, and JMU could add a 17-member male team with men's remaining underrepresented by 0.05%. More importantly, women receive disproportionately fewer scholarship dollars, and JMU would need to add $1,313,000 in women's scholarships to bring the women's total within 1.00% of women's representation in the athletic department, as required by DOE. Given the algebraic interplay between non-scholarship male athletes added and JMU's scholarship-proportionality obligations, adding that 17-member male team would reduce to $1,025,000 JMU's scholarship gap, thereby providing $288,000 to fund the new team.

Because JMU's "charted course" is blatantly unlawful under JMU's and DOE's view of the law, and because the pre-elimination status quo complied

---

[5] EIA will seek leave under Rule 32.3 to file the data, which are available on DOE's website at http://ope.ed.gov/athletics/GetOneInstitutionData.aspx (last visited February 20, 2009).

with JMU's and DOE's view of the law, EIA respectfully submits that the public interest cannot lie in allowing JMU to chart its current course.

D. Legal Error Constitutes Abuse of Discretion and Requires Correction

DOE cites the general rule that this Court awaits final judgments, DOE Opp'n, at 15, without disputing that legal error is an abuse of discretion with *de novo* appellate review. Pet. at 3. While "this [Court's] power would seldom be exercised before final judgment in the circuit court of appeals," "the question at what stage of the proceedings, and under what circumstances, the case should be required by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require." *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 385 (1893). Here, to correct legal error below, to resolve circuit splits on the proper standard for interim relief generally, and to exercise this Court's supervisory role in this important civil-rights arena, the exigencies of this case require this Court's review.

CONCLUSION

The petition for writ of *certiorari* should be granted.

February 20, 2009

Respectfully submitted,

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
* Counsel of Record

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869